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Supreme Court of the United States

OCTOBER TERM, 1975

No 75-559

BASIL VESPE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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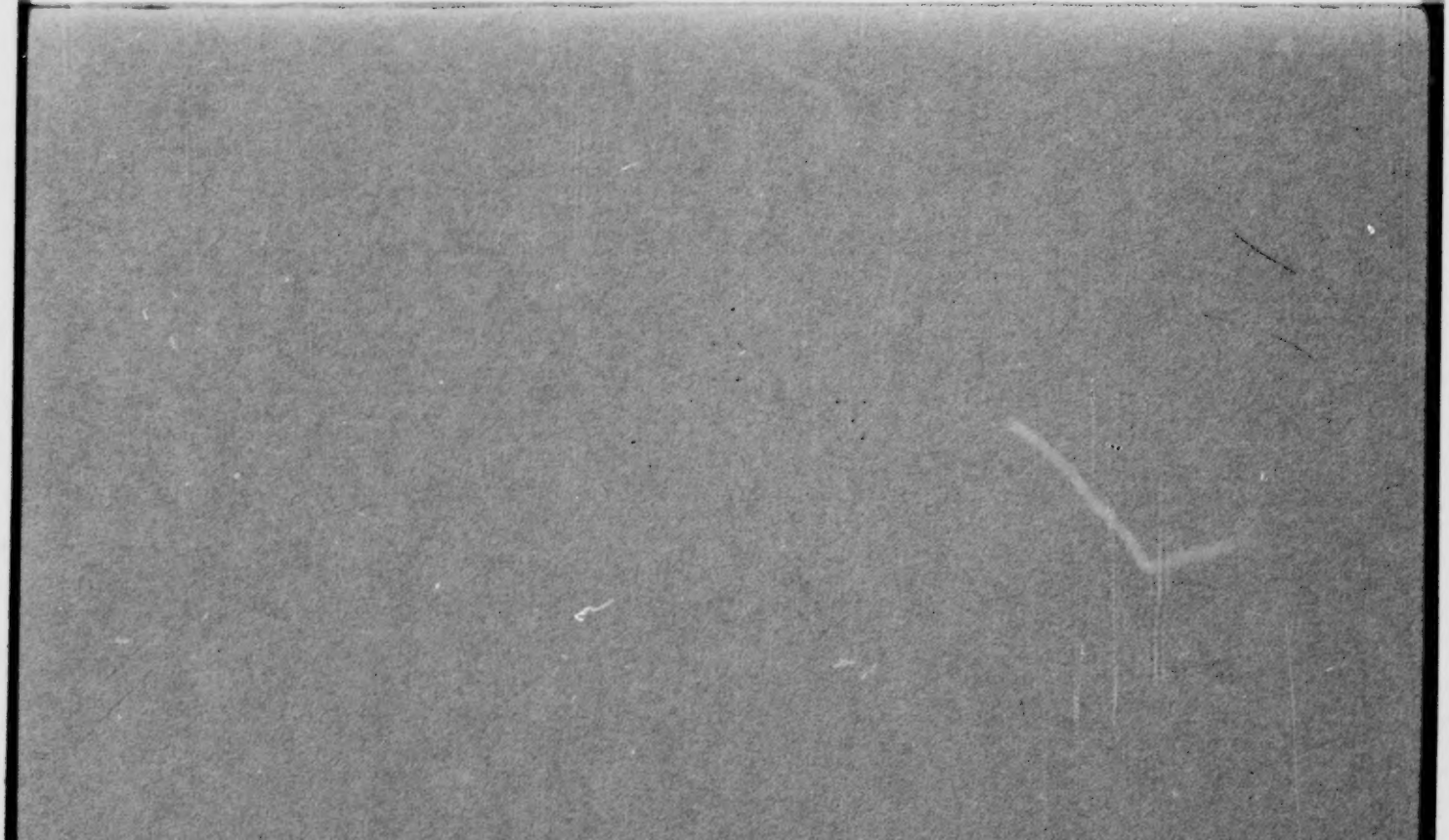

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Basil Vespe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 17, 1975.

OPINIONS BELOW

Petitioner was convicted in Criminal Action No. 74-71 in the District Court of the United States, Delaware District, before the Honorable Judge James L. Latchum. The District Court wrote two opinions: *United States* v. *Vespe*, 389 F. Supp. 1359 (D. Del. 1975) and *United States* v. *Shaffer*, 383 F. Supp. 339 (D. Del. 1975), which appear in the Appendix hereto.

Appeal was taken to the United States Court of Appeals for the Third Circuit in Case No. 74-1213

and the judgment of conviction was affirmed in an opinion and Order of the Court on July 17, 1975, which appears in the Appendix hereto. A Petition for Rehearing was denied in that Court on September 11, 1975.

JURISDICTION

The Order of the Court of Appeals for the Third Circuit affirming petitioner's conviction was entered on July 17, 1975. The Order of that Court denying the Petition for Rehearing was entered on September 11, 1975. Jurisdiction is conferred upon this Court under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether admission of the statements of an alleged co-conspirator who was deceased and unavailable for cross-examination during petitioner's conspiracy prosecution was without proper foundation, led to contradictory, confusing and inappropriate jury instructions, and deprived him of his right to confrontation.

2. Whether petitioner's right to the standard of proof beyond a reasonable doubt was denied him by the failure of the trial judge to instruct the jury on each essential element of the crime charged and by the instruction instead that he had the burden of proving that the subject of an extortion conspiracy, a sum of money, was his property and not that of the alleged victim.

3. Whether the failure of the trial judge to correctly instruct the jury on the elements of the offense charged was plain error.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371 (1970):

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. § 1952 (a), (b), (1970):

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax

has not been paid, narcotics, or prostitution offense in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Title 11, Delaware Code, § 841 (1975):

"'A person is guilty of theft when he takes, exercises control over or obtains property of another person intending to deprive him of it or appropriate it. Theft includes the acts described in §§ 842 through 846.

"'A person is guilty of theft if he, in any capacity legally receives, takes, exercises control over, or obtains property of another which is the subject of theft, and fraudulently converts same to his own use.

Title 11, Delaware Code, § 846 (1975):

"A person commits extortion when, with the intent prescribed in § 846 of this Criminal Code, he compels or induces another person to deliver property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will:

(1) Cause physical injury to anyone; or

(2) Cause damage to property; or

(3) Engage in other conduct constituting a crime; or

(4) Accuse anyone of a crime or cause criminal charges to be instituted against him; or

(5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject anyone to hatred, contempt, or ridicule; or

(6) Falsely testify to provide information or withhold testimony or information with respect to another's legal claim or defense; or

(7) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(8) Perform any other act which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships."

Title 11, Delaware Code, § 847 (1975):

"(a) In any prosecution for theft or extortion it is an affirmative defense that the property was appropriated by the actor under a claim of right, made in good faith to do substantially what he did in the manner in which it was done.

(b) In any prosecution for extortion where the facts are as described in § 846(4) of this Criminal Code, it is an affirmative defense that the accused believed the threatened criminal charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge."

STATEMENT OF THE CASE

The evidence in the trial court showed that Basil Vespe, the petitioner, was, during all times material to the indictment, the chief executive officer of a concrete contracting company in Bellmawr, New Jersey. (Tr. 37-38). In 1970, his company was hired as a subcontractor on three large contracts where corporations controlled by one Joseph Remedio of Wilmington,

Delaware, were the general contractors. (Tr. 106, 109). Out of this business relationship there arose a dispute between Vespe and Remedio about money due Vespe. (Tr. 112, 184, 220). He contended that even though Remedio held back on a portion of the funds due him on the first contract, he was induced to continue doing business with Remedio by Remedio's holding out to him the later and larger contracts into which they entered. (Tr. 337, 351, 360).

As a result of the original holding back and defaults on the subsequent contracts, petitioner contended that Remedio's corporations owed him approximately $87,000. (Tr. 381). At all times, Remedio denied the existence of this debt and for more than two years, until July, 1974, refused to even discuss the matter with Vespe. (Tr. 375-379). When all attempts at negotiation had failed, a civil action was instituted by Vespe in which he sought to obtain the full amount of monies due him from Remedio. (Tr. 341). Thereafter, in July, 1974, while the civil suit was pending, he enlisted the assistance of one Albert Shaffer to attempt to collect the debt due him, or which he thought was due him, irrespective of the progress, or lack thereof, of the civil suit through the Courts. (Tr. 488)

The subject of the indictment was the method Shaffer utilized in attempting to collect the disputed debt from Remedio, which the government contended, amounted to extortion in violation of Delaware law. The events took place between approximately July 3, 1974, and July 22, 1974. Shaffer and Vespe were indicted by a Federal Grand Jury in the District of Delaware on July 25, 1974. Shaffer was charged in four counts, three of which alleged substantive viola-

tions of 18 U.S.C. 1952 based upon travel in interstate commerce and the use of interstate telephone facilities in furtherance of extortion. The fourth count alleged that Shaffer and Vespe conspired to violate Section 1952 with the same basis, interstate travel and telephone calls to further extortion. Vespe was not charged with any substantive crime. In September, 1974, before trial, Shaffer died and the substantive charges against him were dismissed. Vespe was tried alone on the conspiracy charge and a major part of the evidence against him consisted of Remedio's testimony concerning statements made to him by Shaffer, the deceased alleged co-conspirator who was unavailable as a witness.

Over objection, Remedio was permitted to testify that on July 3 or 4, and again on July 10, 1974, he received telephone calls from Shaffer in which he was advised, in substance, that he should meet with Shaffer about the Vespe debt or he would meet with bodily harm. (Tr. 116, 117, 122). They met for the first time in Remedio's office on July 10. Also present at the meeting were two police officers. According to Remedio, Shaffer described himself both as an employee of Vespe and as a creditor of Vespe. While there was considerable discussion of the disputed debt, all parties who testified agreed that the meeting was a normal and uneventful business meeting, even though Remedio never disclosed that the men present were police officers until it was over. (Tr. 69, 71, 75, 125-129).

Remedio next testified that within forty minutes thereafter, he received a phone call from Shaffer which contained threatening and berating statements and specific demands for money. (Tr. 129, 133). At

this point there was no evidence that Vespe had any knowledge of what Shaffer was saying or doing except that he was purportedly attempting to collect Vespe's debt. Just as Remedio was concluding the conversation with Shaffer with a promise to start paying Vespe by check that week, Remedio received a telephone call from one of the police officers who had checked on Shaffer and determined that he had a bad reputation. (Tr. 133-134). Thereafter, a tap was placed on Remedio's telephone with his knowledge and consent, and he was instructed to contact Vespe and make further contact with Shaffer. (Tr. 136).

In response to a call from Remedio, (Tr. 136) Vespe called him on July 12 and that conversation was tape-recorded and was played for the jury during the trial. (Tr. 158). Remedio advised Vespe that he had been threatened by Shaffer. While Vespe acknowledged that Shaffer was working for him and that he had a bad reputation, he denied knowledge of any threats and further denied that he authorized any threats. He specifically disclaimed any intent to resort to violence and repeatedly urged that he and Remedio meet personally to discuss their differences. Vespe agreed to take Shaffer out of the picture pending the meeting they agreed upon for the following week.

Shortly after this conversation ended, Remedio received another call from Shaffer. (Tr. 159). Shaffer repeated his prior demands for what he now called "his" money, berated both Remedio and Vespe, and told Remedio, in essence, that he, Shaffer, was in control of the debt collection and not Vespe. Remedio agreed to send Vespe a check for one thousand dollars dollars immediately. On July 15, Vespe called Reme-

dio and told him that he had received his check but that he was not going to deposit it. Instead he pressed again for a personal meeting which was agreed upon for two days later at Remedio's office. Most of this conversation was devoted to each of the parties discussing the relative merits of their positions as to the disputed debt. Both of these calls were tape-recorded and were played for the jury. (Tr. 162, 166).

The meeting occurred, as scheduled, on July 17 in Remedio's office. In addition to Vespe and Joseph Remedio, his brother Daniel was present throughout. This conversation was also tape-recorded in its entirely and played for the jury. (Tr. 170). It was devoted exclusively, again, to each of the parties discussing the relative merits of their positions on the disputed debt, at times in minute and tedious detail. Vespe several times offered to compromise his demands but more than once counseled Remedio that he should pay nothing if he did not honestly believe he owed it. The meeting ended with nothing resolved except that they would resolve the matter in Court. Vespe agreed to inform Shaffer of this and to remove him from further attempts to collect the debt.

The last of the tape-recorded conversations played for the jury (Tr. 173) occurred on July 22, 1974, principally between Shaffer and Remedio, although Vespe was on the line briefly to listen to Shaffer inform Remedio that Vespe was no longer concerned about the debt, which was now his and his alone to collect. Shaffer attempted, during this conversation, to get Remedio to pay additional monies, but no threats were made at any time against Remedio. Nothing further of any significance occurred in the matter, and three days later the indictment in the case was returned.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant And Recurring Problems Concerning Conspiracy Prosecutions In Federal Courts And The Use As Evidence Therein Of Statements Of Co-conspirators Who Are Unavailable For Cross Examination. In The Trial Court Here The Foundation For The Admissibility Of These Statements Was Insufficient, The Court's Instructions On How The Jury Should Consider Them Were Contradictory, Confusing And Inappropriate To The Facts Of The Case, And In Any Event, The Use Of Such Statements, Which Were "Crucial And Devastating" Evidence Amounted To An Effective Denial Of The Defendant's Right To Confrontation Because The Alleged Declarant Was Deceased And Unavailable As A Witness.

It can scarcely be gainsaid that conspiracy prosecutions have been the target of considerable criticism in recent years. This Court has always been alert to and has "repeatedly warned that [it] will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404 (1975). It has observed that in conspiracy cases "the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant. . . ." *Glasser* v. *United States,* 315 U.S. 60, 76 (1942). Mr. Justice Jackson, in his concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 455-459 (1949), delivered the classic dissertation on the "elastic, sprawling and pervasive offense" of conspiracy. Id. at 445. Therein he observed "the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself," and suggested that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." Id. at 445-446. It is

petitioner's contention that several fundamental errors were committed during his trial below and that they resulted principally from the choice by the government to prosecute him "for conspiracy in lieu of prosecuting for the substantive offense itself." Thus, we suggest that "important considerations of policy behind such warnings," *Gruenwald* v. *United States*, 253 U.S. 391, 404 (1957), compel review of this case by the Court.

As heretofore noted, the indictment returned by the Grand Jury in this case originally contained four counts. Petitioner and Shaffer were charged in one count with conspiracy, in violation of 18 U.S.C. 371, to violate the Travel Act, 18 U.S.C. 1952, by travel and the use of facilities in interstate commerce to commit extortion in violation of Section 846, Title 11, of the Delaware Code. Shaffer alone was named in the other three counts which charged substantive violations of 18 U.S.C. 1952. Shaffer died prior to trial, and the substantive counts were dismissed. Petitioner was tried and convicted on the single conspiracy count. The only acts or declarations which could have possibly formed the basis for a charge of extortion, in that they instilled in the alleged victim, Remedio, a fear that he would be caused physical injury, were done or said by the deceased Shaffer. It is settled that the gist of the offense of conspiracy is the agreement among the conspirators to commit the offense, and not the offense itself. *United States* v. *Falcone*, 311 U.S. 205, 210 (1940). Likewise, the gravamen of a Travel Act violation lies in the interstate travel or use of the interstate facility, not in the underlying State offense.

It is urged that from the outset of the prosecution, petitioner was faced with charges that were needlessly confusing and which hopelessly obsecured the principal thrust of the federal statutes involved. On its face, Section 1952 piggybacks upon State law. Straightforward violations of State law become violations of Federal law where there is evidence of the requisite nexus with interstate commerce. It is settled that prosecution of substantive violations of this sort are proper, even though an additional and unnecessary element of the crime charged is introducing into the case. Whatever confusion might result in ascertaining the principal thrust of the charge is usually minor. Here, though the government compounded the problem and, we assert, for no good reason. Petitioner was charged with no substantive violation of Section 1952. He was charged only with conspiring to use facilities in interstate commerce to commit extortion. The vice of this lies not so much in the very real likelihood that he was not convicted of what he was charged with but that, in all probability, he could not have been convicted of anything else; that he was convicted of the "elastic sprawling and pervasive offense" of conspiracy only because of "the liberal rules of evidence and the wide latitude accorded the prosecution" in conspiracy cases. The errors in the trial court complained of here flow from the government's misuse of the conspiracy statute to the petitioner's prejudice and detriment.

It should be noted that four of the eight overt acts alleged in support of the conspiracy charged the petitioner personally with travel in interstate commerce and personally with the use of interstate telephone facilities. Quite obviously, and quite rightly, we think,

considering the evidence, the government had no confidence that it could prove petitioner guilty beyond a reasonable doubt of any substantive violations of Section 1952. More to the point is the fact that the government did not undertake to prove even that petitioner "counseled," "commanded," "induced," "procured" or "wilfully caused," cf. 18 U.S.C. 2, Shaffer to act in the substantive counts which were originally charged in the indictment. Instead, it chose its last resort, the crime of conspiracy which, again in Justice Jackson's words "is so vague that it almost defies definition." *Krulewitch* v. *United States,* 336 U.S. 440, 446 (1949).

A. The Foundation for the Admission of the Statements of the Alleged Co-Conspirator Was Insufficient.

In *Krulewitch,* the specific prejudice and detriment to the petitioner in the present case was accurately presaged by Justice Jackson when he observed as follows:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.* The naive assumption that prejudicial effects can be over-

> come by instructions to the jury, cf. Blumenthal v. United States, 332 U.S. 535, 559, 68 S.Ct. 248, 257, all practicing lawyers know to be unmitigated fiction." 360 U.S. 440, 453 (emphasis added).

Precisely what happened in this case was that the conspiracy was proven, if at all, by evidence that was admissible only upon the assumption that a conspiracy existed to begin with.

The textbook definition of a criminal conspiracy is that it is a combination of two or more persons to accomplish by concerted action some unlawful purpose or to accomplish some lawful purpose by unlawful means. As noted previously the gist of the offense is the agreement, but the *sine qua non* of the criminality is either the unlawful purpose or the unlawful means. Without one or the other, conspiracy, in the perhaps facetious but certainly the noncriminal sense, may be proven but nothing more. As Justice Jackson pointed out, *supra.*, the prosecution must first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. The rule has been enunciated more precisely where co-conspirators' declarations are involved, to the effect that the declarations of one alleged co-conspirator are admissible against the other only when there is proof *aliunde* that the latter is connected with the conspiracy, *Glasser* v. *United States,* 315 U.S. 60, 74 (1942), and that there is "substantial, independent evidence of the conspiracy itself, at least enough to take the case to the jury." *United States* v. *Nixon,* 418 U.S. 683, 701 n.14 (1974). As we perceive it, "*prima facie,*" "substantial," and

"enough to take the case to the jury" mean much the same and, insofar as determining whether a proper foundation has been shown for the relevancy of the evidence, "acts" and "declarations" also mean much the same.

Since the conspiracy charged in this case involved only two persons, substantial independent proof that a conspiracy existed necessarily had to equate with substantial independent proof that petitioner was connected with it, and *vice versa*. Further, since the petitioner was the only person on trial, all the evidence the government introduced during the trial was admitted "against him" and not against any other person. That the trial court failed to make these distinctions between the facts of this case and those of a multi-defendant conspiracy is evident from its instructions to the jury, discussed *infra*. But the court first failed to consider this in assessing whether the government had met its threshold burden by substantial, independent evidence. In its case-in-chief, the government relied upon three categories of evidence. First, there was the undisputed evidence that Remedio and the petitioner were involved in a controversy over a sum of money and that the petitioner had authorized Shaffer to collect from Remedio what the petitioner claimed was a debt due him. Second, there was evidence of four conversations, three by telephone and one in person, between the petitioner and Remedio during the approximate two-week period of the conspiracy alleged in the indictment. Third, there was evidence of six conversations, five by telephone and one in person, between Shaffer and Remedio, out of the petitioner's presence, during the same period. It is

the admissibility of these latter conversations that petitioner has consistently challenged.

In admitting the evidence of Shaffer-Remedio conversations, the trial court said:

> "At the time the Government offered the declarations and statements of Mr. Shaffer through the testimony of Mr. Remedio and thereafter when Mr. Shaffer's statements on tapes which were recorded on July 12 and 22 were offered as evidence in this case, I admitted those statements subject to a motion to strike unless the Governmen proved prima facie through independent evidence the existence of a conspiracy and defendant's connection therewith.
>
> "Now having heard the testimony of the Government's witnesses and Mr. Vespe's statements and conversations with Mr. Remedio contained on the tapes of July 12, July 15, and July 17 of 1974, the Court is now satisfied, upon viewing such evidence in total perspective and the reasonable inferences arising therefrom, that there has been a prima facie showing and a reasonable likelihood of an illicit association between Mr. Vespe and Mr. Shaffer, to the extent that Mr. Shaffer's declarations made in defendant's absence were properly received in evidence against the defendant, and that those statements will not be stricken from the record." (Tr. 201-202).

We contend the trial court was plainly wrong in this finding for, unless resort is had to the Shaffer-Remedio conversations, there was no evidence of any threats to Remedio, except Remedio's own self-serving statements to petitioner, no evidence at all that petitioner had authorized or directed that such threats be made, and no evidence at all that he had agreed or conspired so to do.

We suggest that any fair reading of the four conversations between petitioner and Remedio compels the drawing of an inference either that Shaffer was wholly involved in a "frolic of his own" or that petitioner and he were working at cross purposes rather than in concert. It should be reiterated that no threats of any kind were contained in these conversations, and the government, in arguing the admissibility of the Shaffer-Remedio conversations, some of which concededly did contain threats, was forced into the position of advancing a rather novel, if not unique, evidentiary theory—that petitioner's claim that he did not know of such threats was evidence that he did know, that his disclaimer of approval of violence was evidence that he did approve of it. In short, the lack of evidence was evidence itself. The court specifically found that there was "a reasonable likelihood of an illicit association between Mr. Vespe and Mr. Shaffer." Apart from the fact that without considering the Shaffer-Remedio conversations, it could not have conceivably come to that conclusion, we suggest further that such a finding falls far short of "substantial evidence that there was an agreement between them to use facilities in interstate commerce to extort" which was what the court was required to find at that point.

B. The Court's Instructions on How the Jury Should Consider the Statements of the Alleged Co-conspirator were Contradictory, Confusing and Inappropriate to the Facts of the Case.

Following the erroneous admission of Shaffer's declarations to Remedio against petitioner, the trial court further complicated the case with its instructions to the jury. It first admitted the offending testimony

tentatively, with the following cautionary instruction which was not solicited by the petitioner:

> "Now, members of the jury: This is a conspiracy case and what has just been testified to is an alleged statement by a co-conspirator, Shaffer. You may not take into consideration—I have permitted this evidence to be admitted, subject to being stricken later if it is not proven by the Government that there was a conspiracy that existed between Mr. Vespe and Mr. Shaffer. If there was a conspiracy and that is proven by independent evidence, aside from any declarations made by Shaffer, then you may consider that evidence. But you cannot consider the evidence until the Government has proven that there was actually a conspiracy between Shaffer and Vespe, because a declaration of Shaffer could not be held against Vespe under the rules of evidence in a court of law in the United States.
>
> "So I have admitted this evidence as to the declarations by Shaffer subject to the Government's proof that there was a conspiracy in existence between Shaffer and Vespe." (Tr. 121-122).

Petitioner had no notice that the court was going to give such an instruction and once it had been given it was pointless to object to it. While such an instruction may be appropriate, if requested by a defendant in a multi-defendant trial, it clearly served no purpose in this case. "[I]f it is not proven by the Government that there was a conspiracy that existed between Mr. Vespe and Mr. Shaffer," surely the court would not merely "strike the evidence," it would "strike the case" by granting a judgment of acquittal.[1]

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[1] That the Court itself clearly misunderstood the requirements of this case is further evidenced by this statement:

"Now I will admit that if independent facts and the infer-

In discussing the cautionary instruction, the Court of Appeals below conceded that "If the second sentence stood alone, we would have to agree that it improperly usurped the jury's function in determining whether Vespe and Shaffer had conspired." (Slip op. p. 3). It went on to hold, however, that "the remainder of the precautionary instruction suggests that the Government must prove *to the jury* that a conspiracy existed between Vespe and Shaffer before they may consider Shaffer's hearsay declarations as evidence against Vespe." (Slip op. p. 3). "To the same effect," it said, "was the court's final charge:

> "In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.
>
> * * *
>
> "Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of its members, then the statements thereafter knowingly made and he acts thereafter knowingly done, by

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ences drawn therefrom satisfy the court that there was a likelihood of an illicit association, those declarations can be admitted, even though it may later eventuate that the independent evidence to be insufficient to justify submitting to the jury the question of the defendant's alleged guilty involvement with the declarant." (Tr. 120).

We do not understand how the Court could find the independent evidence sufficient and then later find it insufficient. Moreover, we do not understand what an "illicit association" is.

> any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.
>
> "Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person, who was not present and who did not hear the statement made, or see the act done.
>
> "Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person who made them." (Tr. pp. 3, 4).

We suggest that instead of curing the vice of the second sentence of the cautionary instruction, the additional and final instructions could only have confused the jury. The Court of Appeals further said:

> "By instructing the jury that they had to find beyond a reasonable doubt that Vespe was connected with a conspiracy before they could consider Shaffer's declarations against him, the court in effect required the Government to meet its burden on the basis of the proof *aliunde* alone. If the proof *aliunde* did not convince the jury of Vespe's guilt beyond a reasonable doubt, the court's charge did not allow them to resolve their doubts through the use of Shaffer's declarations." (Slip op. p. 4).

This not only begs the question, it also misses the entire point of petitioner's complaint because such a

charge, particularly as it concerns a conspiracy involving but two individuals, makes no sense. If it is not reasonable to assume as much, there is at least a substantial risk that the jury, in attempting to plumb the depths of its meaning, would refer back to the only cautionary instruction it received during the trial and conclude that because the evidence had not been stricken, the government had proven its case, at least in the view of the trial judge.

To advise a jury that "Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of its members, then the statements and acts of others may be considered against that defendant," is to advise a jury that "whenever it has found the defendant guilty beyond a reasonable doubt, it may then consider other evidence against him." There may be situations in which such an instruction makes sense but in this case it could not have. The jury below was charged, in effect, that whenever they concluded beyond a reasonable doubt that petitioner and Shaffer were guilty of conspiracy, the only crime charged, then, instead of rendering their verdict, they were to begin considering Shaffer's acts and declarations. But, as heretofore noted, the evidence of Shaffer's acts and declarations were the only evidence of unlawful acts and declarations to begin with. No juror of even average intelligence could have correctly comprehended this. Not only was the conspiracy in this case proven "by evidence that is admissible only upon the assumption that a conspiracy existed," the trial court specifically instructed the jury to consider the evidence in precisely this manner. The fault lies in the trial court's failure to adapt its charge to the jury

to the unusual type of conspiracy before it which, it is urged, constitute plain error.

This situation exemplifies the pitfalls of imprudent conspiracy prosecutions and the tendency of trial judges to instruct juries automatically and by rote. The instructions given in this case were "boiler-plate," unassailable as well-established principles of law. That they were contradictory and had no application to the facts at hand seems to have been overlooked by all up to this point. Nevertheless, the error was more than substantial; it affected the jury's deliberative process in its entirety. Because we are of the view that the conspiracy charge was error to begin with, we are not prepared to suggest even that proper instructions could have been given in this case. Certainly the error, however caused, falls within the ambit of Rule 52 of the Federal Rules of Criminal Procedure.

C. The Use of the Statements of the Alleged Co-conspirator which were "Crucial and Devastating" Evidence Amounted to an Effective Denial of the Defendant's Right to Confrontation Because the Alleged Declarant was Deceased and Unavailable as a Witness.

Constitutional guarantees certainly have priority over evidentiary rules, and this Court has held that, save in exceptional circumstances, the accused is entitled to be confronted by his accusers and to exercise his right to cross-examination, irrespective of evidentiary rules. *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *Alabama,* 380 U.S. 415 (1965); *Brookhart* v. *Janis,* 384 U.S. 1 (1966); *Bruton* v. *United States,* 391 U.S. 123 (1968); *Roberts* v. *Russell,* 392 U.S. 293

(1968). These decisions recognize that the right-of-confrontation and the accompanying right of cross-examination—"the greatest legal engine ever invented for the discovery of truth" (5 Wigmore, *Evidence* § 1367 at 28-29 (3d ed. 1940)—are inalienable and that they are not to be eroded nor emasculated by indirection or subtlety. A denial of the right-of-confrontation is none the less so because it is the result of evidence admissible under an exception to the hearsay rule or for any other reason.

We think it unnecessary to determine whether the evidence of Shaffer's declarations to Remedio was "hearsay" in the conventional sense even though both parties and both courts below have consistently treated it as such. Plainly, it was this evidence which convicted petitioner; without it he could not have been convicted. Whether "hearsay" or not, petitioner was convicted out-of-the-mouth of Shaffer, and it is difficult to conceive of a situation where a defendant's inability to call a witness worked more to his detriment. For the most part, Remedio's testimony as to what Shaffer said to him was uncorroborated. From the beginning petitioner was utterly helpless to refute anything about this testimony while Remedio, on the other hand, was free to exaggerate, embellish and "gild the lily" with no restraint. It is certainly worth noting that the two conversations that were corroborated by tape recordings, those of July 12 and July 22, 1974, are totally inconsistent with the theory that petitioner and Shaffer were acting in concert. On the contrary, they unmistakably tend to establish that Shaffer was on a "frolic of his own." Moreover, the content and tone of the uncorroborated conversations, containing the only threats to Remedio, as testi-

fied to by Remedio, contrast sharply with those that were tape-recorded.

But whatever the purport of all these conversations, their admission into evidence against petitioner in this case denied him a fundamental right. The prejudice to him is obvious. If Shaffer were a witness in his own behalf in a joint trial, he might have denied outright, substantially contravened, or modified the statements attributed to him by Remedio. Or he might have admitted much concerning the statements but denied that he was speaking at petitioner's direction. It is remotely possible, of course, that he might have admitted the content of the statements attributed to him and placed the responsibility therefor with the petitioner. But since that is essentially what petitioner was convicted of, he could hardly have been in a worse position with this eventuality and would have had, at the very least, the opportunity to test the testimony by cross-examination. Another possibility is that Shaffer may have declined to be a witness in his own behalf in a joint trial which, in all likelihood, would have entitled petitioner to a severance. Cf. *DeLuna* v. *United States,* 308 F.2d 140 (5th Cir., 1962); *United States* v. *Echeles,* 452 F.2d 892 (7th Cir., 1965). Under those circumstances, the same possibilities set forth above would exist as to Shaffer's testimony but with one addition: he would invoke his privilege against self-incrimination. In that event, petitioner, who did testify on his own behalf, would have had the right to comment on Shaffer's failure to testify. *DeLuna* v. *United States, supra.* Whatever the outcome then, Shaffer's unavailability as a witness substantially prejudiced the petitioner and it was fundamental error to have admitted his statements.

This position is supported by this Court's decision in *Dutton* v. *Evans,* 400 U.S. 74 (1970). The defendant there was convicted of murder. Among some twenty witnesses called by the prosecution, including an accomplice eyewitness, was a prison inmate, who testified that his cellmate, Williams, also charged with the same murder, had stated by implication that Evans was involved in the crime. The cellmate-declarant did not testify and this Court sustained the admission of the hearsay testimony under a broader co-conspirator's declaration exception than that which prevails in Federal Courts. This Court observed, however, that "of course, Evans had the right to subpoena witnesses, including Williams whose testimony might show that the statement had not been made." 400 U.S. at 88, n.19 (1970). Moreover the plurality opinion emphasized that under the circumstances of that case there were several indicia of the reliability of declarant, which are not present in this case, and that the statement did not "involve evidence in any sense 'crucial' or 'devastating,' " 400 U.S. at 87, as did other cases discussed by the Court and cited previously herein where the right of confrontation had been held denied. Certainly Remedio's uncorroborated testimony as to what Shaffer said to him before July 12, 1974, was "crucial" to the prosecution and "devastating" to the defense. These were the only threats of bodily harm to Remedio, and without evidence of them, an essential element of the crime of extortion as defined by the State of Delaware, is utterly without proof. Likewise, without this evidence, there is no evidence of either an unlawful object or unlawful means in petitioner's enlisting Shaffer to collect the debt. In fact, Shaffer's utterances were the crime itself.

To a similar effect is the Fifth Circuit's holding in *United States* v. *Menichino,* 497 F.2d 935 (5th Cir., 1974). There the defendant was convicted of conspiracy where he had challenged the admissibility of a co-conspirator's statement without being able to confront him. In affirming the conviction, the Court held that there was ample other evidence to establish the existence of a conspiracy and that the admitted testimony was neither crucial nor devastating. The Court said, at 943:

> "Menichino also argues, however, that even if Caine's statement to Brown was properly received under an exception to the hearsay rule, admitting it was error since the confrontation values implicit in the Sixth Amendment were violated by its admission. *California* v. *Green,* 1970, 399 U.S. 149, 155, 90 S. Ct. 1930, 1933-1934, 26 L. Ed. 2d 489, 495 made it plain that although the confrontation clause protections and the hearsay rule overlap, they are not coextensive. Thus even statements properly admitted under hearsay rules may be examined by the court to assure that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' *Dutton* v. *Evans,* 1970, 400 U.S. 74, 89, 91 S. Ct. 210, 220, 27 L. Ed. 2d 213, 227, quoting *California* v. *Green,* 399 U.S. at 161, 90 S. Ct. at 1936, 26 L. Ed. at 498. Read together, *Green* and *Dutton* instruct that a case-by-case analysis is necessary to determine whether, under the circumstances, the unavailability of the declarant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extra-judicial declaration. *United States* v. *Adams,* 9th Cir. 1971, 446 F. 2d 681, 683, *cert. denied,* 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed 2d 257. If so, and if the challenged testimony is "crucial" to the prosecution or "de-

vastating" to the defense, it must be excluded.

> "Several Courts of Appeals have avoided the necessity of the case-by-case analysis in some federal prosecutions by discerning a congruence between the Confrontation Clause and the federal co-conspirator rule that the Supreme Court did not find in *Dutton's* analysis of the more wide-ranging Georgia co-conspirator exception. We need not yet call this Court to that muster, however, since it is apparent here that the challenged testimony was neither 'crucial' nor 'devastating.'"

It is submitted that this case fits squarely within the Menichino test and that the error committed was harmful. This Court has "followed the undeviating rule . . . that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Parker* v. *Gladden,* 385 U.S. 363, 364-65 (1966). For reasons we believe we have amply demonstrated, it would be impossible for this Court "to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

II. The Decision Below Raises A Significant And Recurring Problem Concerning A Meaningful Implementation Of A Defendant's Fundamental Right Ao Be Convicted Only Upon Proof Beyond A Reasonable Doubt.

In whatever way it should have been articulated to the jury, an essential element of the crime charged in this indictment was the *non-existence* of any debt owed by Remedio to petitioner. Otherwise the reference to "property of another person" in Delaware Code Section 841, incorporated into Section 846, is

meaningless.[2] A reading of the record below shows unmistakably that this point was completely lost there. While the court did make reference to "his property" (Remedio's, Tr. 751) and did advise the jury of the affirmative good faith defense available under Delaware law, at no time did it specifically inform the jury that it had a threshold question to decide, that it must find beyond a reasonable doubt that Remedio owed petitioner no debt. The effect of the instructions, as a whole, was to shift the burden of proof to the petitioner to prove, by a preponderance of the evidence, that he believed the funds were legitimately due him.

At the outset, we reiterate that if the government did not prove beyond a reasonable doubt that Remedio did not owe petitioner, then whatever else he may have been guilty of under Delaware law, petitioner was not guilty of extortion. Had the trial in the court below been that of the civil suit over the debt, we suggest that any fair reading of the record compels the conclusion that neither side would have prevailed under any standard of proof in civil cases. The evidence therein was hopelessly in dispute and the only thing that could have been proven beyond a reasonable doubt was that there was a dispute. The trial court did not focus on this issue. Its failure to do so was reversible error under the doctrine of *Screws* v. *United States*, 325 U.S. 91 (1945) to be discussed *infra*, and for another reason.

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[2] "A person commits extortion when, with the intent prescribed in Sec. 841 of this criminal code, he compels another person to deliver property . . ." Title 11, Delaware Code, Sec. 846. "A person is guilty of theft when he takes, exercises control over or obtains property of another intending to deprive him of it or appropriate it. . . ." Title 11, Delaware Code, Sec. 841.

In *In re Winship*, 397 U.S. 358 (1970), this Court placed the right to proof beyond a reasonable doubt in the category of fundamental Constitutional rights. Justice Harlan set forth the crucial function of the reasonable doubt standard of proof in his separate concurring opinion therein, 397 U.S. at 370-72. His thesis was that in a judicial proceeding in which there is a dispute over the facts of an earlier event, the fact-finder cannot acquire unassailably accurate knowledge of what actually happened. Therefore, the trier of fact in a criminal case will sometimes erroneously convict and sometimes erroneously exonerate. The standard of proof is critical because it regulates the relative frequency of these two types of mistaken outcomes. The "beyond a reasonable doubt" standard is crucial to implementing society's uniquely low tolerance for mistaken convictions in criminal cases. Justice Harlan concluded:

> "In a criminal case, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As Mr. Justice Brennan wrote for the Court in *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958):
>
> "'There is always in litigation a margin of error, representing error in fact finding which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.'
>
> "In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination

> of our society that *it is far worse to convict an innocent man than to let a guilty man go free.*" (Emphasis added.)

When this Court ruled *Winship* retroactive in its *per curiam* opinion in *Ivan* v. *City of New York,* 407 U.S. 203, 204-05 (1972), it reiterated the fundamental nature of the "proof beyond a reasonable doubt" standard.

> "*Winship* expressly held that the reasonable doubt standard is a prime instrument for reducing the risk of conviction resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact finder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" 407 U.S., at 204-205.

It is true that this Court held, in *Lego* v. *Twomey,* 404 U.S. 477 (1972), that proof beyond a reasonable doubt was not necessary to sustain the admissibility of an allegedly coerced confession. But, in so holding, this Court re-affirmed the vitality of the *Winship* rule with respect to the burden of proof necessary to sustain a guilty verdict and indicated that had Lego argued the sufficiency of the evidence to meet the *Winship* standard with respect to the issue of guilt, then a constitutional violation would have occurred.

> "A high standard of proof is necessary, we said, to ensure against unjust convictions by giving

> substance to the presumption of innocence. . . . A guilty verdict is not rendered less reliable or less consonant with *Winship* simply because the admissibility of a confession is determined by a less stringent standard. Petitioner does not maintain that either his confession or its voluntariness is an element of the crime with which he was charged. He does not challenge the constitutionality of the standard by which the jury was instructed to decide his guilt or innocence; nor does *he question the sufficiency of the evidence that reached the jury to satisfy the proper standard of proof.* Petitioner's rights under *Winship* have not been violated. *Lego* v. *Twomey,* 404 U.S. 477, 487 (1972). (Emphasis added).

And most recently, in *Mullaney* v. *Wilbur,* 95 S.Ct. 1881 (1975), this Court held that where an essential element of the crime of homicide or manslaughter is that it be intentional, placing the burden of proof on the defendant to establish by a preponderance of the evidence that he acted in heat of passion on sudden provocation was inconsistent with his right to hold the prosecution to the standard of proving beyond a reasnable doubt every fact necessary to constitute the crime charged.

In *Mullaney,* Mr. Justice Powell, writing for the Court, observed:

> "Not only are the interests underlying *Winship* implicated to a greater degree in this case, but in one repsect the protection afforded those interests is less here. In *Winship* the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence. In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the de-

> fendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction. Such a result directly contravenes the principle articulated in *Speiser* v. *Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed. 1460 (1958):
>
> "'[W]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . .of persuading the fact finder at the conclusion of the trial. . . .'" 85 S.Ct., at 1890-91.

This case is indistinguishable from *Mullaney*. Here a critical element of the offense charged is that the petitioner extorted property that he did not believe was his. The trial court's instruction nonetheless shifted the burden of production *and* persuasion to the defendant to demonstrate affirmatively, by a preponderance of the evidence, that the property involved was his, and not that of the victim. It is difficult to conceive of a clearer case of departure from an established constitutional rule.

III. The Failure Of The Trial Court To Instruct The Jury Correctly On The Essential Elements Of The Offense Charged Constitutes Plain Error Requiring Reversal.

It is axiomatic that the judge must instruct the jury accurately on the required elements of the offense charged. This is so even where no objection was taken to the charge. The relevant rule was stated by this Court in *Screws* v. *United States*, 325 U.S. 91, 107 (1945):

> "It is true that no exception was taken to the trial court's charge, . . . [But] where the error

> is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offense are entitled to a fair trial. Whatever the degree of guilt, *those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed.*" (Emphasis supplied).

In the case under review the trial judge in his instructions did not merely omit an element of the offense charged, but rather, *while purporting to read from the statute,* actually altered significantly the elements of the crime charged, effectively eliminating an affirmative defense that would have been available to the defendant had the judge had accurately instructed the jury.

The defendant was indicted for "carrying on of an unlawful activity, said unlawful activity being extortion, in violation of the laws of the State of Delaware, 11 Del. Code § 846(1) and (2), . . . [and] in violation of § 1952(a)(3)." Indictment, Criminal Action No. 74-63. The defendant was, of course, entitled to rely on the law as set forth in the sections of the statutes cited in the indictment. Otherwise, he would not have notice of the "true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady,* 312 U.S. 329, 334 (1941). See also *Cole* v. *Arkansas,* 333 U.S. 196, 201 (1948; *In re Ruffalo,* 390 U.S. 544, 551 (1968).

Delaware Code, Title 11, § 846 provides, in pertinent part:

> "A person commits extortion when, with the intent prescribed in § 841 of this Criminal Code, he compels or induces another person to deliver property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will:
>
> (1) Cause physical injury to anyone; or
>
> (2) Cause damage to property; . . ."

Delaware Code, Title 11, § 841 provides, in pertinent part:

> "A person is guilty of theft when he takes, exercises control over or obtains property of another person intending to deprive him of it or appropriate it. Theft includes the acts described in §§ 842 through 846."

Delaware Code, Title 11, § 847 provides for an affirmative defense to the offense set forth in § 846:

> "(a) In any prosecution for theft or extortion it is an affirmative defense that the property was appropriated by the actor under a claim of right, made in good faith, to do substantially what he did in the manner in which it was done."

The judge in instructing the jury did not accurately read to them the relevant sections of the Delaware Code set forth above. Instead, his instructions were as follows:

> "The indictment charges that the conspiracy described therein was a conspiracy to violate Title 18, United States Code, Section 1952(a)(3). That statute reads, in relevant part, as follows:
>
> "'(a) Whoever travels in interstate commerce or uses any facility in interstate commerce with intent to otherwise promote, manage, establish,

carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (3) shall be guilty of an offense against the United States.'

"An unlawful activity is defined in that statute to include extortion in violation of the laws of the state in in which committed, in this case Delaware.

"Now, 11 Delaware Code Section 836(1) and (2) relating to the offense of extortion provides, in relevant part, as follows *and I am reading:*

"'A person commits extortion when, with the intent to deprive *another person of his property* or to appropriate it he compels or induces another person to deliver property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will (1) cause physical injury to anyone; or (2) cause damage to property.' (Emphasis added) (Tr. pp. 743-44).

"Extortion is the compelling or inducing a person to deliver *his property* to the defendant or a third party by means of instilling into that person a fear that, if the property is not so delivered, the defendant or another (1) will cause physical injury to someone or (2) will cause damage to property. The compelling or inducement must be with intent to deprive the coerced person of his property. (Emphasis added) (Tr. p. 751).

"However, the law of Delaware relating to extortion also provides for an affirmative defense to extortion, *which you need to consider only if you are satisfied that the Government has proven the existence of every element of the crime of extortion beyond a reasonable doubt.*

> "This affirmative defense exists if you find that the defendant has established by a preponderance of the evidence that he intended to compel or induce *Mr. Remedio to deliver property* to the defendant because (1) the defendant believed in good faith that he had a claim of right to the property and (2) that he believed in good faith that he had a right to do substantially what he did in the manner in which it was done. In this regard you are permitted to test the defendant's good faith belief of these two essential elements of the affirmative defense by considering what a reasonable person might have believed or how such person would have acted in similar circumstances." (Emphasis added) (Tr. p. 752).

The instructions given by the judge tell the jury that under the relevant Delaware law extortion "is inducing a person to deliver *his* property to the defendant" (emphasis added), which is patently not the language of the Delaware Code. Instead, the code sections, which defendant was led to believe were applicable, provide that extortion is accomplished by taking from another property—*whether or not that property is that of the* person from whom it is taken. Of course, if the property taken from another is that of the defendant or property which was appropriated by defendant under a good faith claim of right, then no offense would be committed. The affirmative defense provided in Title 11, Delaware Code, § 847, was clearly enacted so that no conviction would obtain where a defendant charged with extortion could demonstrate by a preponderance of the evidence that the property involved was appropriated under a claim of right, made in good faith. By charging that the affirmative defense was available only after the jury found beyond a reasonable doubt that the property

appropriated was that of the alleged victim (*his* property, not that of another) the defense of claim of right to the property was virtually precluded.

If the defendant had been aware from the outset of the prosecution that he was charged with "compelling or inducing another person to deliver *his* property" then he would have endeavored to demonstrate that the property in question was not that of the alleged victim, Remedio, but rather property of another, as well as contending that the petitioner had a good faith claim of right to the property involved.

There is no need to speculate upon whether the error committed was harmful. The trial judge altered the elements of the crime charged in the indictment without giving notice to the defendant so that he could develop his defense at trial to meet the elements of the new crime fashioned by the judge, and effectively eliminated the affirmative defense that would have been available under an accurate and correct instruction.

CONCLUSION

For the foregoing reasons this Honorable Court is respectfully requested to grant the writ of certiorari prayed for pursuant to Rule 19(b), Supreme Court Rules.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion Of The Court Of Appeals
(Filed July 17, 1975)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1213

UNITED STATES OF AMERICA

v.

ALBERT MARTIN SHAFFER, JR.,
AKA, "MONK", AND BASIL VESPE
BASIL VESPE, *Appellant*

(D. C. Crim. No. 74-71)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Argued June 24, 1975

Before VAN DUSEN, ROSENN and WEIS, *Circuit Judges*

VICTOR F. BATTAGLIA, ESQ.,
WILLIAM H. UFFELMAN, ESQ.,
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OPINION OF THE COURT

(Filed July 17, 1975)

PER CURIAM:

The defendant appeals from his sentence on a conviction for extortion and conspiracy to commit extortion in violation of 18 U. S. C. § 1952(a)(3) and 18 U. S. C. § 371. The district court wrote two opinions: *United States* v. *Vespe,* 389 F. Supp. 1359 (D. Del. 1975); *United States* v. *Shaffer,* 383 F. Supp. 339 (D. Del. 1974), which contain the background facts.

In his first argument for reversal, the defendant strongly urges us that the district court committed reversible error in one of the cautionary remarks it made in the course of the trial. At that point in the trial, the Government sought to introduce the out-of-court declarations of Vespe's deceased co-defendant, Shaffer, through the testimony of the complaining witness, Remedio. Counsel for Vespe objected that the Government had not yet proved prima facie Vespe's participation in a conspiracy by proof *aliunde. United States v. DeLazo,* 497 F. 2d 1168, 1170 (3d Cir. 1974). The district court admitted the testimony, subject to its being stricken if the Government failed subsequently, by proof *aliunde,* to demonstrate prima facie Vespe's connection with a conspiracy, with the following precautionary instruction:

> "Now, members of the jury: This is a conspiracy case and what has just been testified to is an alleged statement by a co-conspirator, Shaffer. You may not take into consideration—I have permitted this evidence to be admitted, subject to being stricken later if it is not proven by the Government that there was a conspiracy that existed between Mr. Vespe and Mr. Shaffer. If there was a conspiracy and that is proven by independent evidence, aside from any declarations made by Shaffer, then you may consider that evidence. But you cannot consider the evidence until

the Government has proven that there was actually a conspiracy between Shaffer and Vespe, because a declaration of Shaffer could not be held against Vespe under the rules of evidence in a court of law in the United States.

"So I have admitted this evidence as to the declarations by Shaffer subject to the Government's proof that there was a conspiracy in existence between Shaffer and Vespe."

N. T. 121-22 (quoted, 389 F. Supp. at 1370). The defendant contends that the second sentence in this precautionary instruction left the impression in the minds of the jurors that the conspiracy would have been proven if the court did not subsequently strike the evidence. Since the court did not subsequently strike the evidence, the defendant argues that the jury was in effect directed to find the defendant guilty.

If the second sentence stood alone, we would have to agree that it improperly usurped the jury's function in determining whether Vespe and Shaffer had conspired. However, the offending sentence was embedded in a long trial in which the instructions to the jury, when read as a whole, on the co-conspirator rule were not only consistent with due process but were actually favorable to the accused. The remainder of the precautionary instruction quoted above, in particular, suggests that the Government must prove *to the jury* that a conspiracy existed between Vespe and Shaffer before they may consider Shaffer's hearsay declarations as evidence against Vespe. To the same effect was the court's final charge:

"In determining whether a conspiracy existed, the jury should consider the actions and declarations of all the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his

acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

* * *

"Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of its members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person, who was not present and who did not hear the statement made, or see the act done.

"Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person who made them."[1]

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[1] The last three paragraphs of the above-quoted instruction are in accordance with § 29.06 of Devitt & Blackmar, Federal Jury Practice and Instructions (2d ed.). See also cases cited in 1974 Pocket Part to that volume and Supplemental Service Pamphlet No. 1 (1974-1975); *cf. United States* v. *Bey*, 437 F. 2d 188, 191-92 (3d Cir. 1971).

N. T. 743, 747-48 (quoted, 389 F. Supp. at 1371). By instructing the jury that they had to find beyond a reasonable doubt that Vespe was connected with a conspiracy before they could consider Shaffer's declarations against him, the court in effect required the Government to meet its burden on the basis of the proof *aliunde* alone. If the proof *aliunde* did not convince the jury of Vespe's guilt beyond a reasonable doubt, the court's charge did not allow them to resolve their doubts through the use of Shaffer's declarations. Because the court's final charge thus required the Government to meet its burden by proof *aliunde*, we believe that any prejudice which may have been caused by the court's earlier precautionary instruction was ultimately nullified, so that reversible error was not committed.

A second argument advanced by the defendant also deserves some discussion. The defendant contends that because it violated Delaware law for Delaware police officers to record his telephone conversations with Remedio, the recordings should not have been admitted into evidence. 11 Del. C. § 1335 (quoted in part, 389 F. Supp. at 1372 n. 10) provides in part:

> "A person is guilty of violation of privacy when, except as authorized by law, he . . . .
> (4) Intercepts without the consent of all parties thereto a message by telephone . . . including private conversations."

The district court found, first, that § 1335 does not prohibit a party to a telephone conversation to record it, and, second, that even if § 1335 were violated, it would have no effect on the admissibility of the recordings in federal court. 389 F. Supp. 1372-73. Because we agree with the second ground for the district court's decision, we need not address the question of the proper construction of § 1335.

It is thoroughly settled that, in criminal cases, the federal district courts will decide evidence questions on the

basis of federal, rather than state, law. *United States* v. *Armocida,* slip op. at 2-3 (3d Cir. No. 74-1091, Apr. 11, 1975); *United States* v. *Vespe, supra* at 1372-73 (citing cases). *Cf. United States* v. *Bedford,* slip op. at 5-6 (3d Cir. No. 74-2119, June 30, 1975). This rule is grounded in sound policy considerations. If the states could require federal courts to exclude evidence in federal criminal cases, some convictions would undoubtedly be lost, and the enforcement of congressional policy would be weakened.

We recently decided that "the warrantless recording of a telephone conversation with the consent of only one of the parties is perfectly proper under federal law . . . ." *United States* v. *Armocida, supra* at 3. The defendant, however, inveighs against the creation of a situation in which the federal courts approve violations of Delaware law by Delaware police officers. In considering this argument, we note initially that the FBI had become involved in the case before Remedio's phone was tapped. 389 F. Supp. at 1364. In this situation, it is difficult to understand how Delaware's policy of protecting its residents' privacy could be served by excluding the evidence developed by the Delaware officers at the request of Remedio, a Delaware citizen. Such a holding would simply force the FBI to do the tapping in similar cases in the future, which would be clearly permissible under our holding in *United States* v. *Armocida, supra,* and which would be indistinguishable from the point of view of the person whose call was intercepted, from the tapes in the case before us. Furthermore, Delaware can, if it chooses, enforce its policy with respect to its own officers through the use of civil suits against persons who violate § 1335. For these reasons, we have concluded that the possible harm caused to Delaware's policy occasioned by admission of the wiretap evidence in the case before us is greatly exaggerated by the defendant, and should not deter us from enforcing federal standards of admissibility.

We have carefully considered all the other contentions raised by the appellant, and have found them to be without merit.[2] Accordingly, the judgment of the district court will be affirmed.

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[2] The remaining contentions include the following:

(1) After the court had erred in directing the jury that if Shaffer's statements were not stricken, conspiracy had been proven, the court compounded its original error by instructing the jury to find the defendant guilty if it was satisfied that Vespe acquiesced in the conduct of Shaffer (no objection was made to the court's instructions after the charge—see N. T. 676-77 & 759 and Document 18 in Crim. No. 74-71, D. Del., Third Request for Instructions);

(2) the court erred in admitting the out-of-court statements of Albert Shaffer as against the defendant Vespe;

(3) the defendant is entitled to a judgment of acquittal because, based on evidence, a verdict of guilty could be achieved only by premising improbable inference upon improbable inference;

(4) the defendant is entitled to a new trial by reason of improper, incorrect, and prejudicial statements made by the prosecuting attorney and because of the failure of the prosecuting attorney to correct testimony which he knew, or should have known, was prejudicial and incorrect;

(5) the defendant is entitled to judgment of acquittal for the reason that the conduct complained of is not within 18 U. S. C. § 1952;

(6) the charge against the defendant Vespe should have been dismissed because of fatal variances between the allegations in the indictment and the proof;

(7) the court committed fundamental and prejudicial error in instructing the jury that the defendant had the burden of proving that the debt sought to be collected by Vespe was Vespe's property (see N. T. 736-40 and 751-52, which are not inconsistent with *Mulaney et al.* v. *Wilbur*, —— U.S. —— (Opinion of June 9, 1975, 43 U. S. L. W. 4695), and page 3 of Document 18 in Crim. No. 74-71, D. Del.; see also parentheses under (1) above).

Opinion And Order Of The District Court

(Dated January 31, 1975)

Criminal Action No. 74-71

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, *Plaintiff*,

v.

BASIL VESPE, *Defendant*.

RALPH F. KEIL,
United States Attorney,
BRUCE L. THALL,
Assistant United States Attorney
Wilmington, Delaware
For Plaintiff.

VICTOR F. BATTAGLIA,
WILLIAM H. UFFELMAN,
Biggs and Battaglia,
Wilmington, Delaware,
For Defendant.

LATCHUM, *Chief Judge*.

On August 6, 1974, the Grand Jury returned a four count indictment[1] against Albert Martin ("Monk") Shaffer, Jr. and Basil Vespe.[2] The first three counts charged Shaffer with three substantive violations of either traveling in interstate commerce, or using and causing to be used interstate telephone facilities, with intent to carry

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[1] Docket Item 1.

[2] Following the return of the indictment Shaffer was represented by David Enellenburg, II, Esquire. Vespe was originally represented by William H. Uffelman, Esquire, then by Joel D. Tenenbaum, Esquire, and finally by Henry A. Wise, Jr., Esquire, who acted as Vespe's trial counsel.

on an unlawful activity involving extortion in violation of 18 U.S.C. § 1952(a)(3). The fourth count charged Shaffer and Vespe jointly with conspiracy to travel in interstate commerce and to use or caused to be used interstate telephone facilities with the intent of carrying on an unlawful activity, i.e., extortion, in violation of 18 U.S.C. § 371.

Both defendants filed pre-trial motions to dismiss the indictment under Rule 7(c), F.R.Crim.P., on the ground that it failed to charge any offense.[3] These motions were denied on September 23, 1974, *United States* v. *Shaffer, et al.*, —— F.Supp. ——(D. Del. 1974).

On September 15, 1974, Shaffer was found shot to death[4] in his home state of New Jersey which left Vespe as the sole defendant to stand trial on Count IV of the indictment.

Trial commenced on October 15, 1974 and concluded on October 22. The jury found Vespe guilty as charged. The case is now before the Court on defendant's motion for judgment of acquittal pursuant to Rule 29(c) or for a new trial, pursuant to Rule 33. F.R.Crim.P. The Court will treat the two motions separately.

I. Motion For Judgment of Acquittal

The applicable standard when passing on a motion of judgment for acquittal after trial under Rule 29(c) is well settled. "[T]he Court scrutinizes the evidence, including reasonable inference to be drawn therefrom, from the point of view most favorable to the government and assume the truth thereof. If there is substantial evidence justifying the inference of guilt, irrespective of the evidence adduced by the defendant, the Court must deny the motion." *United States* v. *McGonigal*, 214 F. Supp. 621, 622 (D. Del

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[3] Docket Items 2 & 10.

[4] Docket Item 23.

1963); *United States* v. *Roy*, 213 F. Supp. 479, 480 (D. Del. 1963).

Count IV of the indictment relating specifically to Vespe charged that he and Shaffer, in violation of 18 U.S.C. § 371, did willfully and knowingly combine, conspire, and agree with each other to violate 18 U.S.C. § 1952(a)(3) by (1) traveling in interstate commerce between New Jersey and Delaware and (2) by using and causing to be used interstate telephone facilities from New Jersey to Delaware with the intent to carry on the unlawful activity of extortion, to wit, the obaining of monies from Joseph Remedio hrough threats of physical injury and property damage in violation of Delaware law, 11 Del. C. § 846(1) and (2). The indictment charges eight overt acts were committed in furtherance of the conspiracy as follows: Shaffer traveled from New Jersey to Delaware on July 10, 1974 and used interstate telephone facilities on July 10, 12 and 22, 1974 and that Vespe traveled from New Jersey to Delaware on July 17, 1974 and used interstate telephone facilities on July 12, 15 and 22, 1974.

The Court charged the jury that in order to convict Vespe for conspiracy the government was required to prove beyond a reasonable doubt (1) that the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; (2) that the defendant willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy. (Tr. 740).[5]

A. *Insufficient Evidence*

The first ground of the motion for judgment of acquittal is based on defendant's contention that there was in-

[5] Tr. refers to the Trial Transcript.

sufficient evidence to show the existence of an agreement between Shaffer and Vespe to obtain money from Joseph Remedio through the use of threats.

The evidence adduced at trial from the point of view most favorable to the government reveals the following facts: Joseph W. Remedio ("Remedio") is a general contractor with offices in Wilmington, Delaware who has been in the construction business in Wilmington and the surrounding areas for 24 years (Tr. 104-105). As a general contractor, he bids on proposed construction jobs, and if he is awarded the project as the low bidder, he oversees and builds the project with the use of subcontractors and his own employees (Tr. 104-105). Remedio first established a business relationship with Vespe, a concrete subcontractor, beginning in 1970 in connection with the Peck Sussex Rug Mills building that Remedio was constructing at Bridgeville, Delaware (Tr. 106, 109, 219, 631-632). In 1971, Vespe's firm also was the concrete subcontractor on two high-rise public housing projects being built by Remedio at Millville and Penns Grove, New Jersey (Tr. 111). A dispute arose over Vespe's performance and his subcontracts on these projects were terminated with the result that there is civil litigation pending in a New Jersey state court in which both Remedio and Vespe claim each is owed money by the other (Tr. 112, 184, 220).

Sometime about September 1973, Remedio was visited by two brothers from Philadelphia by the name of DeCarlo, (Tr. 113, 237, 489); they presented a document purportedly signed by Vespe, addressed "To Whom It May Concern" which authorized DeCarlo to collect any balances due Vespe without mentioning any amount or any specific project on which Vespe worked (Tr. 113-114). The DeCarlos stated they were sent down to collect a balance for Vespe of approximately fifty to sixty thousand dollars and wanted to know what Remedio intended to do about it (Tr. 114). Remedio responded that he owed Vespe no money, that all money had been expended on the project to complete

Vespe's unperformed subcontract work, and that he was not going to pay any additional sum (Tr. 114). When the DeCarlos were told this, they began to threaten Remedio and specifically stated that they knew that he had a nice family, and if he didn't want any trouble and anybody to get hurt, he better start paying his debt (Tr. 114-115).

On July 3, 1974 when Remedio returned to his office he found two telephone messages to call Shaffer, whom he did not know (Tr. 123), immediately on a subject matter of importance (Tr. 115). Remedio was unable to reach Shaffer by telephone until the following day, July 4. Shaffer told Remedio he wanted to discuss the Vespe matter. When Remedio indicated there was nothing to discuss and that their attorneys were handling the matter which was already in court (Tr. 116), Shaffer responded that he wished to hear nothing about a court or lawyers, that he was coming to see Remedio at his Wilmington office on Monday or Tuesday, that he had better be there, that, if Remedio was not in his office when Shaffer arrived, it was going to be too bad for him and that he could get a bullet in his head (Tr. 116-117).

Following Shaffer's telephone conversation, Remedio called Detective Lt. Terrence Patton of the Wilmington Police Bureau, (Tr. 123, 62), Remedio's brother-in-law (Tr. 124, 62), and related to him Shaffer's telephone threats and the earlier visit of the DeCarlo brothers (Tr. 122-123). Patton advised Remedio to contact him if he heard from Shaffer again (Tr. 123). The following Monday and Tuesday (July 8 and 9) Remedio heard nothing further from Shaffer (Tr. 123). Remedio had been in the process of moving his office. a move which had been completed over the preceding weekend (Tr. 123, 106).

On July 10 (a Wednesday) Shaffer telephoned Remedio's office and stated: "We went to your old office and we just found out you moved; we will be there in ten minutes, don't leave." (Tr. 124). Remedio immediately contacted

his brother-in-law, Detective Patton, who told Remedio to detain Shaffer in the front office until the police officers could arrive (Tr. 124).

Deectives Patton and Leroy H. Landon soon thereafter arrived at Remedio's new place of business and were ushered back to Remedio's office. Shaffer and an associate were already in the reception area waiting to see Remedio when the detectives arrived (Tr. 125, 67-69, 77). The detectives were wearing plain clothes and when Shaffer and his associate were shown into Remedio's office, Remedio introduced them as his business associates (Tr. 125, 69, 78-79).

Shaffer introduced himself to Remedio and indicated he was there "to talk about the Vespe matter." He stated that Vespe contended Remedio owed Vespe over $80,000. Shaffer claimed he was with the organization, was comptroller, and had been authorized to collect any accounts receivable (Tr. 126). After Remedio told Shaffer that he had terminated Vespe's subcontract on the Millville project because he refused to take corrective measures, Shaffer said: "Vespe owes me $400,000 and I want it," and that "we are visiting all the accounts receivable, and it seems like there were four of them just like yours, they are all in court, and I am getting to the bottom of it because I am owed all this money." (Tr. 127). Shaffer also said that although he was the comptroller, he still had a large investment in the corporation. and was upset about the expenditures that Vespe had made, such as a 51-foot yacht charged to the company (Tr. 127-128). Remedio showed Shaffer documents supporting his position that no money was owed. After about a half hour of discussion, Shaffer, stating that he had seen enough and felt satisfied, said that he would be in touch with the attorneys handling the litigation and then left the meeting with his associates (Tr. 128-129).

Shaffer made no threats (Tr. 75) at the meeting although the discussions were somewhat tense (Tr. 7071, 81, 87). Before leaving, Shaffer was informed by Remedio that Patton and Landon were Wilmington detectives and that Patton was his brother-in-law (Tr. 71). Remedio told Shaffer: "I don't know who you fellows were; I was afraid of you, frankly, and I felt I needed somebody here to help me out." (Tr. 71).

Patton and Landon substantiated Remedio's testimony of the tenor and content of the meeting with Shaffer and his associate (Tr. 6-71, 77-82). In addition, Detective Landon testified that upon entering Remedio's office he noticed a black chauffaur-driven limousine parked outside and he took down the license number (Tr. 78). Landon testified that he believed the limousine that Shaffer had at Remedio's office was the same, or at least it looked like the same, automobile that Vespe later used to visit Remedio (Tr. 92, 95-96).

Approximately forty minutes after Shaffer left the meeting Remedio received a telephone call from Shaffer (Tr. 129-130). Shaffer began the conversation by saying "What do you take me for, some damn fool . . . having police in your office." (Tr. 130). He then stated that Vespe contended Remedio owed Vespe over $80,000 and that he was going to pay $10,000 a week (Tr. 131). Remedio first stated he didn't owe Vespe a dime (Tr. 130), and after being pressed by Shaffer said he didn't have $10,000 a week as things were tight in the construction business (Tr. 131). Shaffer responded: "Well, you better raise it. We are going to chip at you a little at a time. I know where you live, I know you got a wife and son. We are going to get your wife or your son first to show you we mean business, and I got the men to do it. . . . So $10,000 a week or you're a dead Dago." (Tr. 131). When Remedio again protested, Shaffer repeated that Remedio had better start paying or he was going to be dead, that they meant business, that they would hit his son or his wife and

maybe pick off his brother, that they knew where Remedio lives and that "I don't give a damn if you tell the police, you can't watch your family night and day." (Tr. 131-132). He further ordered Remedio to start sending the money to Basil's (Vespe) office every Friday (Tr. 132). He first wanted the money to be sent in cash, but, after Remedio objected, Shaffer agreed to checks saying "Okay, start sending checks, and if you want to, you can make them out to Vespe Contracting Company," and deduct the amount of the payment from the $80,000 and show the running balance with each payment made (Tr. 132). When Remedio asked how he would know whether any checks he sent would be credited to the amount allegedly owed, Shaffer advised him not to worry as he was in Vespe's office at the time he was telephoning Remedio (Tr. 133).

Just before Shaffer hung up, Remedio received a phone call on another line from the Wilmington Detective Division (Tr. 133-134). After Shaffer's call was terminated, Remedio crossed to the other line and was advised by Detective Patton to come to the police station because they had run a background check on Shaffer which showed him to be "a very violent man." (Tr. 133-134). Remedio told Patton that he had just been threatened on the phone by Shaffer and he went directly to the police station (Tr. 133-134, 72-73).

At the police station, Remedio made a formal complaint and the Wilmington Police contacted the FBI. After FBI agents were called in, Remedio agreed to have electronic devices installed in his offices to monitor and record any telephone conversations he might have with Shaffer or Vespe (Tr. 134, 136, 83). Upon dictating a report of his contacts with the DeCarlo brothers and Shaffer, Remedio frightened for the safety of his family and himself, employed off-duty Wilmington police officers to guard his home, his office and members of his family on a 24-hour basis at a weekly cost of $1,900 (Tr. 99, 84-85, 135).

On Friday, July 12, the date when Remedio was to send his check to Vespe at Shaffer's direction, Remedio placed a phone call to Vespe at his office in Bellmawr, New Jersey (Tr. 136). Vespe was not in but returned Remedio's call at 10:10 A.M. on that day (PX 3, Tr. 53-54). During the course of this conversation, Remedio informed Vespe that Shaffer had threatened him, that he had demanded $10,000 be sent to Vespe every Friday, that he was scared and asked whether Shaffer worked for Vespe and whether Vespe condoned such threats. (Tr. 137-139, TT I. pp. 1-3).[6] Vespe indicated he had no knowledge of what transpired between Shaffer and Remedio and stated he had no control over what Shaffer said or did (Tr. 139, 141, TT I. pp. 2, 4). Vespe admitted that Shaffer worked for him and was authorized to collect money for him (TT I., pp. 3, 5, Tr. 486, 488, 492-494). When Vespe was talking to Remedio he stated: "You know, you might have me on tape but I'm not saying nothing. I'm . . . I'm too smart. I don't know what I've done. I haven't done no thing to ya. I don't know whether Al Shaffer threatened you or not but if a guy comes into your office, ah, even if he works for me, I can't control what a guy says or what a guy does, you follow me." (TT I., p. 4, Tr. 140).

Vespe also indicated Shaffer was a dangerous person even though Vespe didn't condone violence (Tr. 138-139). He also stated, "I don't know that much about the guy. I know the guy does have some problems with the law." (TT I., p. 4). "Some people say he's been indicted for 9. . . ." (TT I., p. 9). After an interruption by Remedio, Vespe continued, "And, ah, I don't know whether it's true or not some of the things that they say, I read in the

[6] TT refers to the typewritten transcripts of the taped conversations (PX 4a-e, 5a and b) that Remedio had with Shaffer and Vespe that the jury used as an aid when listening to the tapes. (Tr. 157). The transcripts of the five taped conversations are referred to by roman numerals I through V. See United States v. Lawson, 347 F.Supp. 144 (E.D.Pa. 1972).

paper where he was indicted for murder and I. . . ." (TT I., p. 9). Vespe continued referring to Shaffer's general reputation. "They'll impress ya that the guy is a bad hombre. The guy is just, doesn't have any reality for, ah, life, for jail. I mean he's been in jail." (TT I., p. 9). When Remedio asked why Shaffer was working for him, Vespe commented, "Well, because occasionally he, ah, he's very good, shall we say, he's not a scared to fight, you know a lot of times you gotta go out on a job and fight with the colored people." (TT I., p. 9). Vespe also told Remedio that Shaffer carried a gun and he knew Shaffer could use it (TT I., p. 10). Vespe also admitted he had sent Shaffer down to see Remedio after having gone over the accounts receivable with Shaffer but not to scare him (TT I., p. 10).

Vespe also admitted having previously sent Vince DeCarlo to Delaware to talk to Remedio about paying Vespe the money he claimed was owing (TT I., p. 1). Because Remedio was afraid of Shaffer, he asked Vespe to call Shaffer off and asked whether it would be all right for Remedio to send $1,000 instead of $10,000 demanded by Shaffer (TT I., pp. 16-17, Tr. 13). Interspersed throughout the conversation Vespe stressed he did not condone or advocate violence and that he simply wanted to meet personally with Remedio in order to talk the matter over (TT I., pp. 14-15). Regarding Remedio's request that he send a $1,000 check, Vespe said he would get back to him after about twenty minutes (TT I., p. 17, Tr. 159).

Later on July 12 at 10:51 A.M. another phone call was placed from Vespe's New Jersey offices to Remedio in Delaware, (PX 3) with Shaffer making the call to Remedio. (Tr. 159). In the course of this conversation, Shaffer wanted to know why he had not received the $10,000 check as he had previously demanded and stated that the matter was out of Vespe's hands (Tr. 159-160, TT II., p. 1). Shaffer told Remedio he had to be more careful in driving as he had gone through a stop sign at Concord Avenue in

Wilmington and Vespe would never get his money (TT II., pp. 1-2)[7] Shaffer said that he was in Vespe's office at the time of the call (TT II., p. 4), that he expected a check to be mailed to him that day or he would come pick it up (TT II., pp. 4-5), and that, "If you ain't got it this week, borrow it, sell your wife, your ass, sell your car, but get it, Joe. I waited two . . . years, I ain't waiting no more." (TT II., p. 3). Remedio mailed a check for $1,000 on July 12, 1974 to Vespe. (PX 2).

On Monday, July 15, at 10:40 A.M. Vespe again telephoned Remedio from Vespe's New Jersey office (PX 3, Tr. 16-166, TT III). Vespe indicated he had received the check sent by Remedio and that he was going to hold it pending a meeting to be set up between Remedio and himself (Tr. 165-166, TT III., p. 1). Vespe was apparently aware of Shaffer's conversation with Remedio on July 12, because when Remedio indicated to Vespe that Shaffer had called him after he had talked to Vespe, Vespe replied, "Alright, well things are, I think things are calmed down now." (TT III., p. 1). Vespe made this statement even before Remedio explained the "maniac" behavior of Shaffer (TT III., p. 1). Vespe set up a meeting with Remedio in his office in Wilmington for Wednesday, July 17, the hour to be set later by Remedio (TT III., p. 14, Tr. 167). About noon on Thursday, July 17, Remedio called Vespe and the meeting was set for that evening (Tr. 167-168).

Vespe arrived at Remedio's office at about 7:15 or 7:30 P.M. (Tr. 168). Detective Landon testified that the chauffeur-driven limousine in which Vespe arrived appeared to be the same automobile in which Shaffer had arrived at Remedio's office a week earlier (Tr. 91-92, 94-96). During this conference, the disagreements between Vespe and

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[7] In Vespe's earlier telephone conversation with Remedio he had referred to the possibility that he would not get his money: "If God forbid, you got into an automobile accident and which I'd hate to see." (TT I., p. 6).

Remedio regarding the work Vespe had subcontracted to perform and which Remedio claimed he did not complete were discussed in detail with Vespe claiming he was owed a large sum by Remedio (Tr. 169, TT IV).[8] In the course of this conversation, Vespe discussed a lengthy hypothetical in which he hypothesized a situation in which, if he were a contractor approached by a mob controlled company that indicated he owed them a substantial sum of money, and his altenatives were to pay or be shot and he knew he owed the money, he would pay the sum claimed (TT IV., pp. 33-34). In addition, Vespe at times reinforced Remedio's impression of how dangerous Shaffer was while in the same conversation stating he did not like and did not condone violence. For example, the following took place at one point (TT IV., p. 43):

> *Vespe:* I'm sure, Joe, that you've checked the guy's, ah. . . .
>
> *Remedio:* You're goddamn right I checked.
>
> *Daniel Remedio:* We know all about him.
>
> *Vespe:* I'm sure that you know the guy's been indicted, what, eleven times for murder.
>
> *Remedio:* I don't know about that. Eleven times for murder?
>
> *Vespe:* Eleven times. That's what they say.

Remedio wanted the New Jersey court to decide the dispute and did not want Shaffer involved; Vespe appeared to agree to this resolution (Tr. 171-172).

Nothing more was heard of the matter until Monday, July 22, at 10:48 A.M. when Shaffer telephoned Remedio in Wilmington from Vespe's office (PX 3, Tr. 172, TT V). In this conversation, Shaffer asked Remedio why he had

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[8] In addition to Vespe and Remedio at the July 17 meeting was Daniel Remedio, Remedio's brother. (Tr. 167, 171).

not received another check from Remedio (Tr. 172, TT V., p. 1. When Remedio tried to tell Shaffer that he and Vespe had resolved the matter and were to proceed with the New Jersey court action, Shaffer became belligerent and in no uncertain terms indicated his displeasure at any possible resolution other than his understanding that Remedio was going to pay $60,000 (Tr. 172, TT V., p. 1). Shaffer also indicated that Vespe was no longer involved in the collection of the debt, and to show Remedio that Vespe had turned the collection matter over to the control of Shaffer, Shaffer had Vespe get on a phone extension and the following dialogue occurred (Tr. 172, TT V., pp. 2-3):

Shaffer: He's gonna call ya and tell ya, wait a minute, hold on, is Basil in the office? Is Basil upstairs? Would ya ring him? What lines he on? Yeah, I'm on 28. Yes.

Vespe: Hello.

Shaffer: Basil?

Vespe: Yeah.

Shaffer: Yeah you're on the same line the three of us with Joe, Joe Remedio, now now I want you to say once and for all. I told you not to go to Delaware. You went to Delaware, okay. Now you come back and cut it down to $60,000. Now Joe, you hear me?

Remedio: I'm listening.

Shaffer: Alright, Basil, stay the fuck out of my business with Joe Remedio.

Remedio: Now, Basil, he says it's his business again.

Vespe: Right.

Remedio: Now.

Vespe: You got it Monk.

Remedio: Huh?

Shaffer: You hear the man on the phone?

Vespe: You got it.

Special Agent Andrew M. Palumbo of the FBI interviewed Vespe on July 2, 1974 following his arrest in this case (Tr. 34-36). Palumbo testified that Vespe indicated to him that he knew Shaffer and had known him a number of years (Tr. 38). Vespe also stated that Shaffer had told Vespe that Shaffer knew Remedio, and that Shaffer had traveled to Wilmington, Delaware to meet with Remedio in order to discuss arrangements through which Remedio would pay Vespe funds Vespe claimed were owed by Remedio (Tr. 39). Vespe stated specifically he had sent Shaffer for the purpose of collecting $87,000, and that Shaffer had authority to collect the $87,000 (Tr. 40). In addition, Vespe showed to Palumbo a cover letter and an original $1,000 check made payable to Vespe's company drawn on Remedio's construction company in Wilmington (Tr. 41-43; PX 2). Vespe testified that in January of 1974 he learned that Shaffer was in the accounts receivable business. Vespe did not know the name of the business, nor whether there were any offices from which Shaffer operated. He did not know whether anyone worked for Shaffer in connection with his business (Tr. 486-487).

Vespe also testified that in January or February of 1974, he decided to employ Shaffer to assist in collecting Vespe's accounts receivables (Tr. 488). Vespe stated that he made no attempt at that time to contact any other firm prior to employing the services of Shaffer (Tr. 490). According to Vespe, most accounts receivable firms work on a percentage basis, but Shaffer was only to be paid if Vespe was satisfied with the amount that he received from those whom he claimed owed him money (Tr. 492). Vespe stated that Shaffer would receive $2,500 per satis-

factory settlement (Tr. 493-494), but that Shaffer never received any funds whatsoever because a satisfactory settlement was never reached on any account with which Shaffer had been involved (Tr. 494). In fact, Vespe indicated that the only instance in which he was aware that Shaffer had been involved in any way in trying to collect an outstanding claim on behalf of Vespe's business was with Remedio (Tr. 495). In addition, Vespe stated that Shaffer helped around the office by answering the telephone and also carried cash payrolls to job sites because he had a license to carry a gun (Tr. 498-499). Yet, Vespe did not pay Shaffer for any of these last mentioned services (Tr. 499-500). Vespe also indicated that Shaffer had no ability as an accountant (Tr. 528-529), and that he must have discussed Shaffer's visiting Remedio some time prior to Shaffer's visit to Delaware on July 10 and perhaps somewhat earlier (Tr. 531-532). Furthermore, Vespe admitted that he had spoken with Shaffer after July 10, and that Shaffer had told him of the presence of two police officers in Remedio's office (Tr. 536).

The evidence summarized above and the reasonable inferences arising therefrom provide an ample basis for the jury to rationally infere that Vespe and Shaffer willfully and knowingly conspired and agreed with each other to violate 18 U.S.C. § 1952(a)(3) by (a) traveling in interstate commerce between New Jersey and Delaware and (b) by using and causing to be used interstate telephone facilities with the intent to carry on the unlawful activity of extortion, viz., the obtaining of money from Remedio through threats of physical injury in violation of 11 Del. C. § 846(1) and (2) and without awaiting the outcome of litigation between Vespe and Remedio pending in the New Jersey state court.

It is quite clear that Vespe had no confidence of successfully recovering a judgment on his disputed claim against Remedio in the New Jersey state court litigation. He therefore retained the assistance of Shaffer, a man

known to him to be dangerous, in order to force Remedio by threats of bodily harm to himself and his family to pay the large sums demanded. The interplay between Shaffer, the heavy-handed "gorilla" and "bad hombre" (TT V., p. 4, TT I., p. 9, Tr. 199, 246) and Vespe, the reasonable man who disliked violence, upon Remedio's will and nerves was too highly attuned and orchestrated both in timing and content of conversations not to have been agreed upon in advance. Vespe played upon Remedio's fear of Shaffer and reinforced it in every conversation. The enmeshing of the actions and conversations of Shaffer and Vespe with Remedio could have occurred only through full discussion and close cooperation between them in proceeding upon an overall scheme and plan to force Remedio to pay a substantial sum of money on a highly disputed claim which Vespe did not believe was legally collectable through pending court litigation. Therefore the defendant's motion for judgment of acquittal on the ground that there was insufficient evidence to show the existence of an agreement between Shaffer and Vespe to extort money from Remedio through threats of bodily injury will be denied.

B. *Defendant's Conduct Was Not Within the Purpose of 18 U.S.C. § 1952.*

Defendant's second ground for judgment of acquittal is based on the argument that 18 U.S.C. 8 1952 was intended exclusively to curtail unlawful activities of organized crime, and that, since no connection between the defendant and organized crime was either alleged or proved, defendant's conduct is not within the intendment of the Act. This argument is without merit. While it is true "that § 1952 was aimed primarily at organized crime," *Rewis* v. *United States*, 401 U.S. 808, 811 (1971), its chief focus is upon the use of the facilities of interstate commerce with the intent of furthering unlawful activities. "It is, in short, an effort to deny individuals who act for such a criminal purpose access to the channels of commerce."

Erlenbaugh v. *United States*, 409 U.S. 239, 246 (1972). In disposing of a similar argument advanced in *United States* v. *Roselli*, 432 F.2d 879, 885 (C.A. 9, 1970) *cert. den.* 401 U.S. 924 (1971), *reh. den.* 402 U.S. 924, the Court stated:

> "The words of section 1952 are general; they contain no restriction to particular persons or to particular kinds of gambling, liquor, narcotics, and prostitution offenses.
>
> "The reasons seem self-evident. It would usually be difficult, if not impossible, to prove that an individual or business was associated with or controlled by a clandestine criminal organization. It might also be difficult to prove that a particular offense was of the kind commonly engaged in by organized criminals in 1961; and, in any event, such restriction upon the statute's coverage would provide an easy avenue for evasion through adoption of new forms and techniques of illicit trafficking. Nothing in the legislative history suggests that Congress intended prosecutors and courts to read into the Act such highly restrictive and administratively impractical exclusionary provisions. On the contrary, as we read the legislative record, Congress meant exactly what the language of section 192 states—it deliberately chose to make the statute applicable generally, and without crippling restrictions, to any person engaged in any kind of illicit businss enterprise in one of the four fields of activity specified in the state, which experience showed to be those in which organized racketeers commonly engaged."

To the same effect is *United States* v. *Colacurcio*, 499 F.2d 1401, 1405 (C.A. 9, 1974); *United States* v. *Mahler*, 442 F.2d 1172, 1175 (C.A. 9, 1971), *cert. den.* 404 U.S. 993; *United States* v. *Isaacs*, 347 F. Supp. 743, 753 (N.D.Ill

1972). Defendant's motion based on this ground will be denied.

II. Motion for New Trial

The defendant has advanced five different errors allegedly committed during the course of the defendant's trial, any one of which, defendant contends, entitles him to a new trial in the interest of justice. These alleged errors will be discussed *seriatim.*

A. *Court's Instruction to Jury Relating to Conspiracy Was Error.*

Vespe first contends that the Court in ruling upon the admission of out-of-court statements of Shaffer, in effect, erroneously instructed the jury that if Shaffer's out-of-court statements were not later stricken, that the government had sustained its burden of proving that a conspiracy existed between Vespe and Shaffer.

It is the general rule, as well as the rule of this Circuit, that the existence of a conspiracy and the defendant's connection therewith must be proved prima facie to the satisfaction of the Court before the declarations of one conspirator made in defendant's absence can be admitted against a conspirator defendant. *United States* v. *DeLazo,* 497 F.2d 1168, 1170 (C.A. 3, 1974). But declarations of one co-conspirator may be received at any time during the course of a trial subject to subsequent proof of the existence of the conspiracy and the connection of the defendant therewith. *Esco Corporation* v. *United States,* 340 F.2d 1000, 1008-9 (C.A. 9, 1965); *United States* v. *Sansone,* 231 F.2d 887, 893 (C.A. 2, 1956), *cert. den.* 351 U.S. 987.

During the early part of the trial when Remedio began to testify of statements made by the deceased Shaffer, the alleged co-conspirator of Vespe, Vespe's counsel objected to Shaffer's statements on the ground that before Shaffer's statements that were made out of Vespe's presence could

be admitted and used against Vespe there had to be a showing to the Court that a conspiracy existed and that the defendant was connected therewith (Tr. 117-118). Argument was heard on the objection out of the presence of the jury (Tr. 117-119). While the Court was troubled with the prosecution's order of proof, it stated and warned the government while the jury was out as follows (Tr. 119-120):

> "Well, the trouble I have, Mr. Thall—and you know that the general rule is that the existence of a conspiracy and the defendant's connection therewith must be proved at least prima facie to the satisfaction of the Court by creditable, independent evidence before declarations of one conspirator made in the defendant's absence can be received against the defendant.
>
> "Now, I will admit that if independent facts and inferences drawn therefrom satisfy the Court that there was a likelihood of an illicit association, those declarations can be admitted, even though it may later eventuate that the independent evidence proves to be insufficient to justify submitting to the jury the question of the defendant's alleged guilty involvement with the declarant."

After this warning, the prosecutor made a plea in the interest of a clear presentation of the evidence to the jury that it should be unveiled in chronological order. The Court then replied (Tr. 121):

> "Well, you are running a risk, and I am going to admit this evidence, but subject to being stricken and whatever else that I may do."

Upon the return of the jury to the courtroom, the Court warned the jury of the receipt of this evidence as follows (Tr. 121-122):

"Now, members of the jury: This is a conspiracy case and what has just been testified to is an alleged statement by a co-conspirator, Shaffer. You may not take into consideration—I have permitted this evidence to be admitted, subject to being stricken later if it is not proven by the Government that here was a conspiracy existed between Mr. Vespe and Mr. Shaffer. If there was a conspiracy and that is proven by independent evidence, aside from any declarations made by Shaffer, then you may consider that evidence. But you cannot consider the evidence until the Government has proven that there was actually a conspiracy between Shaffer and Vespe, because a declaration of Shaffer could not be held against Vespe under the rules of evidence in a court of law in the United States.

"So I have admitted this evidence as to the declarations by Shaffer subject to the Government's proof that there was a conspiracy in existence between Shaffer and Vespe.

"All right. With that warning, keep in mind what this evidence is."

At the time of admitting Shaffer's declarations subject to subsequent independent proof of the existence of the conspiracy and defendant's therewith in order to permit the evidence to be presented in chronological order, the Court was simply warning the jury that they could not consider such evidence until and unless they found a conspiracy to exist between Shaffer and Vespe. This was well within the trial Court's discretion. *United States* v. *Bey*, 437 F.2d 788, 190-191 (C.A. 3, 1971); *Parente* v. *United States*, 249 F.2d 752, 754 (C.A. 9, 1957).

At the beginning of the third day of trial, before the jury entered the courtroom, the Court formalized its prior ruling (Tr. 119-121) by stating (Tr. 201-202):

"At the time the Government offered the declarations and statements of Mr. Shaffer through the testimony of Mr. Remedio and thereafter when Mr. Shaffer's statements on tapes which were recorded on July 12 and 22 were offered in evidence in this case, I admitted those statements subject to a motion to strike unless the Government proved prima facie through independent evidence the existence of a conspiracy and defendant's connection therewith.

"Now having heard the testimony of the Government's witnesses and Mr. Vespe's statements and conversations with Mr. Remedio contained on the tapes of July 12, July 15 and July 17 of 1974, the Court is now satisfied, upon viewing such evidence in total perspective and the reasonable inferences arising therefrom, that there has been a prima facie showing and a reasonable likelihood of an illicit association between Mr. Vespe and Mr. Shaffer, to the extent that Mr. Shaffer's declarations made in defendant's absence were properly received in evidnce against the defendant, and that those statements will not be stricken from the record.

"Now, that is only the question as to the admissibiliy which I left in some doubt at the time that I made my initial ruling, and I am making this out of the hearing of the jury, of course."[9]

It should be noted that included in the preliminary instructions (Tr. 11-14) given to the jury at the beginning of the case was the warning: "After this case has been

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[9] This ruling was in line with the holdings in United States v. Pordum, 451 F.2d 1015, 1017 (C.A. 2, 1971), *cert. den.* 405 U.S. 998 (1972); United States v. Geaney, 417 F.2d 1116, 1120 (C.A. 2, 1969), *cert. den.* 397 U.S. 1028 (1970); Carbo v. United States, 314 F.2d 718, 735-737 (C.A. 9, 1963), *cert. den.* 377 U.S. 953 (1964), *reh. den.* 377 U.S. 1010.

submitted to you, you must discuss the case only in the jury room when all members of the jury are present. You are to keep an open mind and you must not decide any issue in this case until the case is submitted to you for your deliberation under the instructions of the Court." (Tr. 14).

At the close of the trial, the Court gave lengthy and detailed final instructions to the jury regarding the nature of the conspiracy law, the manner in which it related to the instant case, and the essential elements of the conspiracy charged with the government was required to prove beyond a reasonable doubt (Tr. 734-758). With respect to the statements of a co-conspirator, the Court specifically instructed the jury as follows (Tr. 743):

> "In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members."

In addition, the Court further instructed (Tr. 747-748):

> "Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of its members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.

"Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence any person, who was not present and who did not hear the statement made, or see the act done.

"Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person who made them."

It is inconceivable that the jury was in any way confused by the warning given on the second day of trial regarding the conditional admission of evidence of Shaffer's declarations upon completion of the final instructions that were given just before the jury commenced its deliberations. Furthermore, the defendant has completely misinterpreted the warning given. The clear import of the warning was that Shaffer's statements were being admitted subject to proof by the government of the existence of the conspiracy and that until this was proved, Shaffer's statements could not be held against Vespe. The Court was required to make a finding at some point that a sufficient prima facie showing had been made as to the existence of a conspiracy *aliunde* of the challenged declarations to warrant consideration of such declarations by the jury. This is exactly what the trial Court did. *Rizzo* v. *United States*, 304 F.2d 810, 826-827 (C.A. 8, 1962), *cert. den.* 371 U.S. 890. The Court finds no merit to defendant's first reason for a new trial.

B. *Error In Admitting Tape Recordings into Evidence.*

As a second ground for granting a new trial, the defendant contends that it was error to admit into evidence the electronically taped telephone conversations which occurred between Vespe and Remedio, and Shaffer and Remedio because the recording of such conversations violated

Delaware state law. It is claimed that 11 Del. C. § 1335(4) [10] prohibits the interception of a telephone conversation unless the interception is made with the consent of both parties to conversation, citing *Commonwealth* v. *Murray*, 423 Pa. 37, 223 A.2d 102 (1966). The defendant argues that the Delaware statute was patterned after the Pennsylvania statute construed in *Murray* and thus it is a valid precept of statutory construction that copying a statute of another state carries with it the adoption of the interpretations of the statute of the state from which it was adopted.

The Court finds no merit to this argument. First, the *Murray* case was distinguished in a later Pennsylvania case, *Commonwealth* v. *Goldberg*, 208 Pa. Super. 513, 224 A.2d 91 (1966), on the ground that *Murray* did not involve the interception by a subscriber on his own line. The *Goldberg* court held that a subscriber had a "paramount right" to make interception on his own telephone line. Remedio's interception in this case comes within the *Goldberg* rather than the *Murray* rule even if the Pennsylvania cases applied to the Delaware statute. Secondly, the Court is unconvinced that the Delaware statute was copied from the Pennsylvania Act. The language of the two statutes is quite different and more importantly the commentary on § 1335 by the drafters of the Delaware Criminal Code stated: "Unauthorized wiretapping is contrary to federal law, but it is right that State law should also be on record against it." Del. Crim. Code with Commentary, 1973, p. 404. This statement suggests that the drafters of the Delaware statute were attempting to emulate the federal law, 57 U.S.C. § 605, which, of course, does not prohibit the recording of telephone conversations made with the consent of one party. *United States* v. *Littman*, 421 F.2d

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[10] 11 Del. C. § 1335 provides in part: "A person is guilty of violation of privacy when, except as authorized by law, he . . . (&) Intercepts without the consent of all parties thereto a message by telephone . . . including private conversations."

981, 983 (C.A. 2, 1970), *cert. den.* 400 U.S. 991 (1971); *United States* v. *Kaufer,* 406 F.2d 550, 552 (C.A. 2, 1969), *aff'd* 394 U.S. 458, *reh. den.* 395 U.S. 917; *Harris* v. *United States,* 400 F.2d 264, 267 (C.A. 5, 1968); *Dryden* v. *United States,* 391 F.2d 214, 215 (C.A. 5, 1968); *Parkhurst* v. *Kling,* 249 F.Supp. 315, 316 (E.D.Pa. 1965), *reconsidered* 266 F.Supp. 780 (1967).

Despite all this, however, even if Delaware law were considered to have been violated, this fact would not render the taped recordings inadmissible in a federal criminal trial because federal and not state law provides the standard governing admissibility of evidence in a federal court. *United States* v. *Johnson,* 484 F.2d 165, 168 (C.A. 9, 1973), *cert. den.* 414 U.S. 1112; *United States* v. *Escobedo,* 430 F.2d 603, 607 (C.A. 7, 1970), *cert. den.* 402 U.S. 951 (1971); *United States* v. *Teller,* 412 F.2d 374, 377 (C.A. 7, 1969), *cert. den.* 402 U.S. 949 (1971); *United States* v. *Krol,* 374 F.2d 776, 778 (C.A. 7, 1967), *cert. den.* 389 U.S. 835; *United States* v. *Jones,* 369 F.2d 217, 220 (C.A. 7, 1966), *cert. den.* 386 U.S. 944 (1917); *United States* v. *McGuire,* 381 F.2d 306, 215 (C.A. 2, 1967), *cert. den.* 389 U.S. 1053 (1968); *Ferguson* v. *United States,* 307 F.2d 787, 789-790 (C.A. 10, 1962), *opinion withdrawn and new trial granted on other grounds,* 329 F.2d 923 (C.A. 10, 1964). Defendant's motion for a new trial based on its second ground will be denied.

C. *Admission of Co-conspirator's Hearsay Statements Violated Defendant's Sixth Amendment Right to Confront Witness.*

Defendant's third ground for urging a new trial is that this Court erred in permitting Remedio to testify as to the content of Shaffer's unrecorded telephone threats made to Remedio on July 4 (Tr. 116-117) and July 12, 1974 (Tr. 129-134). The defendant argues that without this hearsay testimony the government could not prove that Remedio was instilled with the fear necessary to prove extortion as defined in 11 Del. C. § 846, and because this hearsay evi-

dence was crucial to the government and devastating to the defendant, its admission violated Vespe's Sixth Amendment right to confront Shaffer. There is no merit to this contention.

Shaffer was an indicted co-conspirator with Vespe. He was shot to death after indictment but before trial. As set forth in detail under Point I of this opinion, there was ample evidence, putting aside the hearsay in question as required by *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942), from which the jury could find not only the existence of a conspiracy but also that Remedio was in mortal fear of bodily injury to himself and his family. For example, this fear is shown not only in the recorded conversations between himself, Vespe and Shaffer which took place on July 12, 15 and 22 but is also confirmed by the testimony of the police officers who interviewed Remedio (Tr. 72-74, 83) and by the fact that Remedio expended over $1,900 weekly to ensure off-duty police protection for himself and family. This corroborating evidence of Remedio's fear of physical injury affords sufficient "indicia of reliability" of Shaffer's hearsay threats to permit their admission in evidence. This is particularly so because the record is clear that the defendant was afforded full opportunity to cross-examine Remedio who testified to the dead co-conspirator's threats and also because Shaffer's threatening statements when uttered were admissions against his penal interest.

Finally, Vespe's contention that admitting into evidence Shaffer's threats through Remedio's testimony violated Vespe's Sixth Amendment right to confront Shaffer is also without merit. This argument and contention in a case factually similar to the present case was soundly and completely rejected by Judge Adam's excellent and explicit opinion in *United States* v. *Weber*, 437 F.2d 327, 336-340 (C.A. 3, 1970), *cert. den.* 402 U.S. 932 (1971). In view of the Third Circuit opinion this Court can add nothing further in rejecting defendant's third ground for a new trial.

D. *Prosecutor's Prejudicial Conduct.*

During the first day of trial a subsidiary factual issue arose as to whether Shaffer arrived at Remedio's office on July 10 in the same chauffeur-driven automobile that Vespe later used in visiting Remedio's office on July 17. Detective Patton on direct examination testified that when he and Officer Landon approached Remedio's office on July 10, they "observed a 1974 black Cadillac limousine, with temporary registration tags, parked outside with a chauffeur, with a gentleman in a chauffeur's uniform behind the wheel." (Tr. 68). No questions were asked Patton during cross-examination regarding this testimony. The next witness to testify was Detective Landon who stated that upon arriving at Remedio's office on July 10, they noticed "a black limousine parked in a 'No Parking' area, and we took the tag number down, driven by a chauffeur with a cap on." (Tr. 78). Landon on direct also indicated that he had followed Vespe's automobile from the [Delaware Memorial] bridge to Remedio's office on July 17 (Tr. 86). On cross-examination, Landon stated in response to defense counsel's questions that Vespe had traveled to Wilmington on July 17 in a car that was leased out of Philadelphia and that the car had Vespe's name written on it (Tr. 90-91). Landon further testified, in response to defense counsel's questioning, that Shaffer had arrived at Remedio's office on July 10 in the same car or one that looked the same as the one that Vespe arrived in on July 17 (Tr. 91-92). Landon acknowledged that on July 10 the car had a temporary Pennsylvania license plate while on the 17th the automobile had a different license tag (Tr. 92).

On redirect examination, in order to clarify Landon's testimony on cross-examination, the following questions and answers relating to the car were asked and given (Tr. 95-96):

Q. You have indicated twice on cross examination,[11] Detective Landon, that you think the care were the same because they had the same name. Could you explain what you mean "the same name"?

A. It was a black car, all black. It had Vespe's name wrote on it in red letters.

Q. On the side of the car?

A. Yes. With like a white circle around it.

Q. This was the car you observed with the temporary tags on the 10th as well as the car you observed on the 17th?

A. Yes.

It is clear that Detective Landon based his identification of the vehicles on what appeared to him to be Vespe's name printed in red letters within a white circle on the side of the limousine (Tr. 92, 95-96).

Vespe denied that Shaffer was provided with Vespe's car to visit Remedio on July 10 (Tr. 517-519) and Vespe also testified that only his vehicle and no other company car had his name lettered on the side (Tr. 519).

From the dispute as to whether Shaffer traveled to Remedio's office in a Vespe car on July 10, the defendant argues that the prosecutor must have known the vehicles were of different ownership because the police officers recorded the registration number of the chauffeur-driven car observed at Remedio's office on July 10 and they must have checked its ownership. Thus, it is contended on the authority of *Brady* v. *Maryland*, 373 U.S. 83 (1963), that when the government failed to place this information, which it must have known, in evidence, it withheld favorable evidence from the defense and denied the defendant a fair trial.

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[11] Tr. 91-92.

The Court finds no merit to this argument. First, this argument presupposes as proven facts that (1) Detectives Patton and Landon checked the number of the temporary license plate with the Pennsylvania authorities to determine ownership of the vehicle, and (2) that the information received as a result of that check showed the car not to have been owned or leased by Vespe. The present record fails to support any such assumptions as to the actions of the police officers.

Secondly, there appears to have been no refusal to disclose or suppression of exculpatory evidence unknown to the defendant at time of trial. In *Brady, supra* at 87, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." In *Moore* v. *Illinois*, 408 U.S. 786, 794-5 (1972) *reh. den.* 409 U.S. 897, the Supreme Court in explaining *Brady* stated:

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment."

The underlying rationale of these cases is that an accused is denied a fair trial when items of favorable or exculpatory evidence unknown to him at the time of trial were not produced or were suppressed by the government. There is nothing in the present record, other than pure speculation, that the government failed to disclose or suppressed evidence of the ownership of the vehicle observed by the police officers at Remedio's office on July 10. Moreover, defense counsel was fully aware on the first day of trial by the testimony of Detectives Patton and Landon that they had recorded the temporary license plate of the car observed at Remedio's office on July 10 (Tr. 68, 78). No follow up of this testimony was undertaken by cross-

examination of Patton. Indeed, when Landon was cross-examined by defense counsel, the following colloquy occurred (Tr. 92):

> Q. What was the license number of the car that came there that Mr. Shaffer was in?
>
> A. It was a Pennsylvania registration. I have it in my reports, but they are in the back of the room. The car Mr. Shaffer came in, it was the same car but had a temporary plate, a white plate, white cardboard with black lettering.
>
> Q. You mean it was the same car or one that looked the same?
>
> A. It looked the same.
>
> Q. So it might not have been the same at all?
>
> A. Well, it had the same name on it and it looked the same to me.

Thus, no request was made to examine the report or permit Landon to obtain his report which was in the courtroom to give the temporary license number even though defense counsel by his questions hinted the car might not have been the same.[12] There was not the slightest indication that the government would have objected either to showing Landon's report to the defense if it had been requested or to permitting Landon to use it to refresh his

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[12] Had defense counsel permitted Landon to refer to his report in order to give the number of the temporary Pennsylvania plate on the first day of trial, it would have been a simple matter for the defense to have checked with the Pennsylvania licensing authorities to determine the vehicle's registered ownership if the defense believed that to be important. The Supreme Court said in Moore v. Illinois, supra at 795: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."

memory of the number of the temporary plate. Under these circumstances, this is not a *Brady* type situation where the existence of possible material evidence is unknown to the defendant at time of trial and is not disclosed by the government. Here the defendant was made aware that Landon had recorded the temporary plate number in his report which was present in the courtroom but failed to request the production of the report and failed to ask him whether he checked with the Pennsylvania authorities regarding the ownership of the vehicle. The Court concludes there was no suppression of material evidence unknown to defendant at trial and that the failure to pursue the matter, which was fully known to the defense early in the trial, was a tactical decision of the defense and was no fault of the government.

The defense has filed a post-trial affidavit of Alfred DiGiacomo [13] (Docket Item 44) which states that he accompanied Shaffer to Remedio's office on July 10 in a 1974 four-door black Cadillac sedan which was driven by Shaffer and not by a chauffeur, that Shaffer had "picked this automobile up from the Center City Cadillac Company a few days before July 10," that the car bore temporary tags, did not have Vespe's name printed on it but did have Shaffer's initials inscribed on its side. This, of course, is not newly discovered evidence because with due diligence it could have been presented at trial and moreover is simply cumulative of the defense testimony given by Vespe and by Harry Sadler, Vespe's private chauffeur, who testified that Vespe's vehicle was not used by Shaffer to visit Remedio on July 10 (Tr. 517-519, 627-630). In any event, this cumulative evidence does not appear to be very material considering all the other evidence in the case and it is not of such a nature that it would probably produce

[13] Remedio did not at first recognize DiGiacomo when he attended the July 10 meeting with Shaffer but then he was told by DiGiacomo that he had been on the Millville job as Vespe's foreman (Tr. 125-127).

a different verdict if the case were retried. Defendant's motion for a new trial on these grounds will be denied.

E. *Court Erred in Refusing To Permit Interviews of the Jurors After Verdict.*

After the return of the verdict finding the defendant guilty as charged (Tr. 760-761), the jurors were individually polled upon defendant's application (Tr. 761-762). Immediately thereafter, defense counsel made a special request "that the jury be polled as to whether they read or heard anything about this case since the trial started." (Tr. 762). The request was denied and the jury was dismissed. The Court denied the request because it was made after the verdict had been returned and there was nothing before the Court that would overcome the presumption that the jury had strictly followed the admonitions and instructions given each day not to read any publicity about the case (Tr. 762-763).

At the beginning of the trial after voir dire of the jury panel (Tr. 5-10) and after the jury had been drawn and sworn (Tr. 10-11), the Court gave preliminary instructions which explained their duties and responsibilities (Tr. 11-14). Among the instructions then given included the following (Tr. 12, 14):

> "The law applicable to this case will be contained in the instructions I give you during the course of the trial, and it is your duty to follow all such instructions."
>
> * * *
>
> "Until this case is submitted to you for your deliberation, you must not discuss this case with anyone or remain within hearing of anyone discussing it. Neither should you read any newspaper article, listen to any radio broadcast, nor view any television program which may discuss this case during the trial.
>
> "After this case has been submitted to you, you must discuss this case only in the jury room when all members of the jury are present. You are to keep an open

mind and you must not decide any issue in this case until the case is submitted to you for your deliberation under the instructions of the Court."

Because the jury was not sequestered, this admonition was repeated to the jury on each day of the trial every time the Court recessed for lunch and at the end of the trial day (Tr. 47, 101, 164, 200, 272, 384, 449, 516, 590, 664-665). In the face of these clear and repetitive admonitions throughout the trial, it could not be presumed that the jurors had disregarded their duties and violated the instructions of the Court particularly when there was no suggestion of any wrongdoing at the time that the special request was made immediately after return of the verdict on October 22, 1974. *Opper* v. *United States,* 348 U.S. 84, 95 (1954); *United States* v. *Restaino,* 405 F.2d 628, 630 (C.A. 3, 1969); *Estes* v. *United States,* 335 F.2d 609, 615 (C.A. 5, 1964), *cert. den.* 379 U.S. 964 (1965), *reh. den.* 380 U.S. 926; *Rizzo* v. *United States,* 304 F.2d 810, 815 (C.A. 8, 1962), *cert. den.* 371 U.S. 890.

Under date of December 12, 1974, the Court received a copy of a letter written by defense counsel to the Assistant United States Attorney who prosecuted the case. This letter advised that defense counsel had retained a private investigator to interview the jurors who sat on the trial of this case for the purpose of demonstrating to the Court defense counsels' personal belief that trial publicity had affected the jury's verdict (Docket Item 36, EX B, p. 5). The Court on December 13, 1974 wrote to all counsel and set forth its concern for such an undertaking and outlined the risks involved (Docket Item 36, EX B, pp. 3-4). As a result of this correspondence, defense counsel asked for and were granted a conference with the Court at which all counsel attended on December 17, 1974 (Docket Item 36, EX B, p. 1; Docket Item 38, p. 2). At the conference defense counsel stated that they wished to interview the members of the jury to determine whether they were influenced by newspaper publicity during the trial. The

Court advised counsel to file a written motion and any supporting affidavits outlining what was proposed and what action it desired the Court to take (Docket Item 38, p. 3). As a consequence, the defendant filed a motion and supporting affidavit of the defendant (Docket Item 37) on that day and oral argument was heard on December 18, 1974 (Docket Item 38).

The motion indicates that nine news stories appeared in the Morning News and Evening Journal papers published in Wilmington during the course of the trial in which reference was made to the "gangland style" slaying of defendant's co-conspirator, Shaffer, a "reputed mobster" with "extensive underworld contacts." (Docket Item 36, EX A). The motion, verified by the defendant, also stated: "During the course of the trial, at least one juror was observed carrying a copy of a newspaper into the jury box." (Docket Item 36, par. 2). Paragraph 4 of the motion continues:

> "4. Counsel have retained the investigative firm of John J. Begley Associates to perform the subject investigation. Counsels' instructions to the investigative firm are:
>
> (a) That each juror who is interviewed shall be notified that there is no compulsion on his part to discuss the matter with the investigator.
>
> (b) Each juror who elects to cooperate will be asked whether or not during the course of the trial he obtained any information about the Defendant outside the Courtroom dealing with this case.
>
> (c) If the answer to the above question is in the affirmative, the investigator will then inquire as to the source of any such information."

For the reasons set forth in open court (Docket Item 38, pp. 16-19), the defendant's motion was rejected and an order was entered that day denying the defendant

"permission and approval of the Court to interview the trial jurors in the above captioned case." (Docket Item 37).

Thus, defendant's final ground for granting a new trial is based on the Court's failure to inquire of the jury after verdict whether they had read the news stories and the Court's later refusal to grant the defendant's private investigator permission to interview the jurors as sought in its December 18, 1974 motion.

Upon reconsideration of these matters, the Court reaffirms its original rulings denying the motions.

It was long the settled rule that counsel's communication with jurors after verdict regarding their conduct and deliberations was frowned upon. The compelling public policy behind this rule was to keep the jury room inviolate. The Supreme Court in addressing itself to this point in *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1911) stated:

> "But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."

See also *Rakes* v. *United States*, 169 F.2d 739, 746 (C.A. 4, 1948), *cert. den.* 333 U.S. 826; *United States* v. *Schneiderman*, 106 F. Supp. 906, 925-927 (S.D.Cal. 1952). Indeed, the practice of interviewing a juror after trial as to his state

of mind during trial is specifically disapproved in the Third Circuit. *United States* v. *Hohn,* 198 F.2d 934, 938 (C.A. 3, 1952), *cert. den.* 344 U.S. 913 (1953); *United States* v. *Provenzano,* 240 F.Supp. 393, 411-413 (D.N.J. 1964), *aff'd* 353 F.2d 1011, *cert. den.* 384 U.S. 905 (1966); *United States* v. *El Rancho Adolphus Products,* 140 F. Supp. 645, 653 (M.D.Pa. 1956), *aff'd* 243 F.2d 367, *cert. den.* 353 U.S. 976 (1957), *reh. den.* 354 U.S. 927.

It is also persuasive that Delaware attorneys under The Delaware Lawyers Code of Professional Responsibility, Vol. 13, Del. Code Ann. (1970 Pocket Part), are advised in DR 7-108: "After discharge of the jury from further consideration of a case with which a lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury."

If every disappointed defendant in a criminal case after a verdict of conviction is returned could undertake an investigation to fish around into either the mental attitude or conduct of jurors in the hope of turning up some misconduct, there would never be a finality to a case. It is as Justice Holmes wrote in Holt v. United States, 218 U.S. 245, 251 (1910): "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

Now there is no doubt that there may be extraordinary circumstances, despite the policy considerations of freedom of deliberation, finality of verdict, and avoidance of jury tampering underlying the protection of the integrity of the jury system, which may induce a court to inquire into jurors' irregularity and misconduct by post-trial interview of the jurors. *Mattox* v. *United States,* 146 U.S. 140, 149 (1892); *United States* v. *Kum Seng Seo,* 300 F.2d 623 (C.A. 3, 1962); *United States* v. *Kohne,* 358 F. Supp. 1046, 1051 (W.D.Pa. 1973) *aff'd* 485 F.2d 682 (C.A. 3, 1974).

But post-trial interviewing of jurors that tend to harass, embarrass or frighten them or influence their conduct in future cases on which they may sit should be permitted with caution and great care and only upon a showing of substantial legal reason. Such interviews should never be granted on mere speculation or assumption of irregularity.

In this case the only reason advanced some seven weeks after the trial is a statement by the defendant that during the course of the trial he observed a juror carrying a copy of a newspaper into the jury box. No one else, including the Court, noticed any such incident and it is too speculative to presume even if this were observed by the defendant whether it was in fact a newspaper, or a local paper at that, or that it was read by the juror. It can not be assumed that any of the jurors failed to heed the Court's repetitive warnings. Furthermore, if this incident was observed it was incumbent upon trial counsel to call this to the Court's attention at the time it occurred during trial and not wait until after verdict. If it had been raised when noticed, the Court would have had the opportunity to make a full inquiry and if necessary to have taken corrective action.

The Court thus concludes that a substantial legal reason has not been shown to require this Court in its discretion to grant the requested juror interviews after verdict. The Court further concludes that this contention is but an afterthought on defendant's part. The motion for a new trial on these grounds will be denied.

ORDER

For the foregoing reasons, the defendant's motion for judgment of acquittal, defendant's motion for a new trial (Docket Item 40) and defendant's motion for an evidantiary hearing (Docket Item 46) are hereby denied.

Dated: January 31, 1975.

/s/ James L. Latchum
James L. Latchum
Chief Judge

Memorandum Opinion And Order Of The District Court

(Dated September 23, 1974)

Crim. A. No. 74-71

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

ALBERT MARTIN SHAFFER, JR., aka "MONK" and BASIL VESPE, *Defendants*.

LATCHUM, Chief Judge.

Defendants Albert Martin Shaffer, Jr., also known as "Monk," and Basil Vespe have moved to dismiss [1] a four count indictment that was returned against them on August 6, 1974, charging a violation of 18 U.S.C. § 1952(a)(3) [2] and of 18 U.S.C. § 371.[3] The first count charges Shaf-

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[1] Shaffer's motion to dismiss was timely filed under this Court's Rule 50(b) Plan. See, 3(a)(2) on August 12, 1974 and was briefed and argued on September 12, 1974. Vespe's motion was untimely filed on September 12, 1974 and ordinarily would have been barred from consideration, yet since it is identical to Shaffer's motion, the Court will consider both motions in this opinion.

[2] 18 U.S.C. § 1952(a)(3) states, in relevant part:

"(a) Whoever travels in interstate . . . commerce or uses any facility in interestate . . . commerce. . . . with intent to—

* * * * *

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or

fer with traveling in interstate commerce on or about July 10, 1974, in violation of 18 U.S.C. § 1952(a)(3).[4] The second and third counts charge Shaffer with using a facility in interstate commerce, viz., a telephone, on or about July 12, 1974 and July 22, 1974, respectively, in violation of 18 U.S.C. § 1952(a)(3). The fourth count charges both Shaffer and Vespe with willfully and knowingly conspiring to violate 18 U.S.C. § 1952(a)(3), in violation of 18 U.S.C. § 371.[5] This Court is asked to dismiss the indictment under Rule 7(c), F.R.Crim.P., on the ground that it fails to sufficiently charge any offense.

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attempts to perform any of the acts specified in subparagraph . . . (3) . . .

(b) As used in this section, unlawful activity means . . . (2) extortion . . . in violation of the laws of the State in which committed or of the United States."

[4] The alleged "unlawful activity" was extortion, to-wit, obtaining monies from JOSEPH REMEDIO through threats of physical injury and property damage, in violation of 11 Del.Code § 846(1) and (2). . . ."

11 Del.Code § 846(1) and (2), state:

"A person commits extortion when, with the intent [to deprive another person of his property or to appropriate it] he compels or induces another person to deliver property to himself or to a 3rd person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will:

(1) Cause physical injury to anyone; or

(2) Cause damage to property; . . ."

[5] Count IV charges that from on or about July 3, 1974, up to and including July 22, 1974, the defendants willfully and knowingly conspired with one another to travel in interstate commerce to obtain monies from Joseph Remedio through threats of physical injury and property damage, in violation of 11 Del. Code §§ 846(1) and (2) and to use a facility in interstate commerce, that is a telephone, for the same purpose. The performance of eight overt acts in furtherance of the conspiracy is also alleged.

[1-3] An indictment is constitutionally defective if it does not "contain the elements of the offense intended to be charged, . . . sufficiently apprise the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, . . . show with accuracy to what extent he may plead a former acquittal or conviction." Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 419, 76 L.Ed. 861 (1932). Rule 7(c) is intended to implement these constitutional standards. United States v. American Oil Co., 249 F.Supp. 799, 807 (D.N.J.1966); Cf. Russell v. United States, 369 U.S. 749, 760-64, 82 S.Ct. 1938, 8 L.Ed.2d 240 (1962). Prior courts, when confronted with the issue of the sufficiency of an indictment charging a substantive offense arising under 18 U.S.C. § 1952(a)(3), have held that the essential element of the crime is traveling in interstate commerce, or the use of a facility of interstate commerce with the intent to facilitate the performance or attempt to perform a state crime, and, consequently, that the alleged "performance thereafter" need not be stated with the same specificity. United States v. Teemer, 214 F.Supp. 952, 956-57 (N.D.W.Va.1963); United States v. Nichols, 421 F.2d 570, 573-74 (C.A. 8, 1970). In light of this authority, defendants' contention that Counts I, II and III are void because they do not state "the alleged illegal activities, the language of the threats, and the sum or sums sought to be extorted," is without merit.[6]

[4-6] Defendants also object to Count IV on the general ground that it "fails to properly charge an offense." An indictment charging a conspiracy is sufficient if it alleges an agreement, and identifies both the object towards which the agreement is directed and an overt act. United

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[6] It is noted that on or about September 12, 1974 the Assistant United States Attorney voluntarily turned over to the attorneys for the defendants the taped telephone recordings allegedly containing some of the extortion threats.

States v. Borland, 309 F.Supp. 280, 286 (D.Del.1970).[7] Since the fourth count manifestly contains these three elements, defendants' objection is without merit. Accordingly, the defendants' motions will be denied.

ORDER

For the reasons stated above, it is ordered that the defendants' motions to dismiss are hereby denied.

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[7] Although it is not necessary that the indictment state the object of the agreement with the detail required of an indictment charging the substantive offense, *Id.*, Count IV incorporates verbatim the wording of the three substantive counts of the present indictment.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-559

BASIL VESPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court are reported at 389 F.Supp. 1359 (Pet. App. 8a-44a) and 383 F. Supp. 339 (Pet. App. 45a-48a). The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 520 F.2d 1369.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1975. A timely petition for re-

hearing was denied on September 11, 1975. The petition for a writ of certiorari was filed on October 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether statements of a co-conspirator who died prior to trial were properly admitted.
2. Whether the government proved every essential element of the offense beyond a reasonable doubt.
3. Whether the trial court properly instructed the jury.

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted of violating the Travel Act (18 U.S.C. 1952) and 18 U.S.C. 371, by conspiring to travel in interstate commerce and use interstate facilities to commit extortion in violation of 11 Delaware Code 846(1) and (2) (1975). He was sentenced to four years' imprisonment, all but six months of which was suspended in favor of probation, and was fined $5,000.

The facts are set forth in some detail in the district court's opinion denying petitioner's motion for a judgment of acquittal or a new trial (Pet. App. 8a-44a). The evidence showed that petitioner engaged Albert Shaffer, Jr.,[1] to help him obtain money from Joseph Remedio, and that in attempting to ob-

[1] Shaffer was indicted with petitioner but died prior to trial (Pet. App. 8a-9a).

tain the money Shaffer used methods that violated Delaware law.

Petitioner was a concrete subcontractor with whom Remedio established a business relationship. A dispute arose over petitioner's performance; each party claimed that he was owed money by the other and civil litigation was commenced in a New Jersey state court (Pet. App. 11a).

On July 3, 1974, Remedio found two messages at his office to call Shaffer, whom he did not know. When Remedio told Shaffer the next day that he would not discuss the Vespe dispute, Shaffer stated that he would come to Remedio's office on Monday or Tuesday and that if Remedio was not there he could get a bullet in his head (Pet. App. 12a). Remedio, who had been threatened about the Vespe dispute the previous September by other individuals (Pet. App. 11a-12a), called Terrence Patton, a Wilmington police detective, and told him about the threats.

On July 10 Shaffer told Remedio to expect a visit shortly. Remedio called Patton, who (with another officer) immediately went to Remedio's office.[2] Remedio introduced the officers to Shaffer as business associates (Pet. App. 12a-13a). Shaffer stated that he was authorized to collect petitioner's accounts receivable. Remedio again disclaimed any debt to

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[2] Shaffer was already at Remedio's office when the officers arrived. Patton noticed a limousine parked outside and copied the license number. The other officer testified that the limousine looked like the same limousine which petitioner later used to visit Remedio (Pet. App. 14a).

petitioner, and Shaffer said that he would contact the attorneys handling the litigation (Pet. App. 13a).

Approximately forty minutes after this meeting Shaffer called Remedio and castigated him for having police officers present. Shaffer demanded that Remedio pay $10,000 a week to the Vespe Contracting Company until $80,000 had been paid. Shaffer threatened Remedio and his family with bodily harm and death if the payments were not forthcoming (Pet. App. 14a-15a).

Patton subsequently advised Remedio that Shaffer was known to be a very violent man. Remedio agreed to cooperate in a federal investigation, and the Federal Bureau of Investigation installed monitoring devices on his telephone and in his office (Pet. App. 15a).

Between July 12 and July 22 five conversations between Remedio and Shaffer, Remedio and petitioner, and, in one instance, among all three men, were recorded. The pattern of these conversations was that Shaffer would demand money from Remedio, threatening him and telling him that the matter was out of petitioner's hands, while petitioner would disclaim any resort to violence. Petitioner admitted to Remedio that Shaffer was authorized to collect debts on his behalf and repeatedly told Remedio of Shaffer's reputation as a violent man who often had been accused of murder. At one point petitioner offered Remedio a "hypothetical" situation, stating that if he were a contractor who was told by a mob-controlled company that he owed it money and

that his alternatives were to pay or be shot, he would pay. Finally, in one telephone conversation between Remedio and Shaffer, in which Shaffer was talking from a phone in petitioner's office, petitioner got on the line and told Remedio that the collection matter had been turned over to Shaffer (Pet. App. 16a-21a).

Following his arrest petitioner told federal agents that he had known Shaffer for some years and that Shaffer was authorized to collect debts on his behalf (Pet. App. 21a-22a).

After setting forth the evidence produced at trial, the district court stated (Pet. App. 23a):

> The interplay between Shaffer, the heavy-handed "gorilla" and "bad hombre" * * * and [petitioner], the reasonable man who disliked violence, upon Remedio's will and nerves was too highly attuned and orchestrated both in timing and content of conversations not to have been agreed upon in advance. [Petitioner] played upon Remedio's fear of Shaffer and reinforced it in every conversation. The enmeshing of the actions and conversations of Shaffer and Vespe with Remedio could have occurred only through full discussion and close cooperation between them in proceeding upon an overall scheme and plan to force Remedio to pay a substantial sum of money on a highly disputed claim which [petitioner] did not believe was legally collectable through pending court litigation.

ARGUMENT

1. The tape recordings of the conversations with Remedio were played in court, and Remedio testified concerning certain unrecorded conversations he had with Shaffer. Petitioner contends that Remedio's testimony should have been excluded because: (a) it is hearsay and the district court did not require sufficient nonhearsay proof of petitioner's participation in the conspiracy; (b) the district court's instructions to the jury regarding the admission of these statements were erroneous; and (c) Shaffer's unavailability as a witness (due to his death prior to trial) denied petitioner his Sixth Amendment right of confrontation. As the detailed factual presentation of petitioner demonstrates, these arguments require only the application of settled principles to the facts of this case. Accordingly, there is no reason for further review.

a. As petitioner observes, the hearsay statements of one conspirator cannot be considered against another until the latter's connection with the conspiracy has been established through adequate nonhearsay evidence. Hearsay statements may be admitted prior to the establishment of a particular defendant's participation in the conspiracy subject to later proof of the conspiracy's existence and the defendant's participation. The order of proof is a matter within the trial court's discretion. *United States* v. *Martinez*, 481 F.2d 214, 220-221 and n. 16 (C.A. 5), certiorari denied, 415 U.S. 931; *Esco Corporation* v. *United*

States, 340 F.2d 1000, 1009 (C.A. 9); *United States* v. *Sansone*, 231 F.2d 887, 893 (C.A. 2), certiorari denied, 351 U.S. 987.

In the present case, evidence of Shaffer's statements to Remedio was received subject to subsequent independent proof of petitioner's participation in the conspiracy, and the jury was instructed of the provisional nature of the admission of this evidence (Pet. App. 25a-27a).

Independent evidence of petitioner's participation in a conspiracy with Shaffer was introduced. In addition to petitioner's own recorded statements to Remedio indicating that Shaffer was authorized to collect debts for petitioner, that petitioner was aware of Shaffer's violent nature, and that "the matter would not be settled in the courts," petitioner also told federal agents that Shaffer was authorized to collect debts owed him (Tr. 38-40). Telephone toll records showed calls being made from petitioner's telephone at the times in which conversations between Remedio and Shaffer occurred on July 12, 15, and 22, 1974 (Gov't. Exh. 3; Tr. 53-54). This evidence was sufficient under the most exacting standards to allow the jury to consider any hearsay evidence that may have been contained in Remedio's testimony.

Indeed, most of Remedio's testimony was not hearsay at all, for it simply related the threats made to him by Shaffer. These threats were not statements "offered in evidence to prove the truth of the matter

asserted" (Fed. R. Evid. 801(c)) but were, as petitioner admits, "the crime itself" (Pet. 25). They therefore were admissible without respect to the hearsay rules. Petitioner was entitled to contend, and did contend, that Shaffer was not authorized to make the threats on his behalf. But the jury found otherwise, and the threats themselves were not excludable on hearsay grounds.

b. During trial petitioner's counsel objected to the admission of Shaffer's statements. The district court allowed the prosecution to introduce this evidence subject to connection and instructed the jury as follows (Tr. 121-122; Pet. App. 2a-3a, 27a):

> Now, members of the jury: This is a conspiracy case and what has just been testified to is an alleged statement by a co-conspirator, Shaffer. You may not take into consideration—I have permitted this evidence to be admitted, subject to being stricken later if it is not proven by the Government that there was a conspiracy that existed between Mr. Vespe and Mr. Shaffer. If there was a conspiracy and that is proven by independent evidence, aside from any declarations made by Shaffer, then you may consider that evidence. But you cannot consider the evidence until the Government has proven that there was actually a conspiracy between Shaffer and Vespe, because a declaration of Shaffer could not be held against Vespe under the rules of evidence in a court of law in the United States.
>
> So I have admitted this evidence as to the declarations by Shaffer subject to the Government's

> proof that there was a conspiracy in existence between Shaffer and Vespe.
>
> All right. With that warning, keep in mind what this evidence is.

Petitioner contends that this instruction was confusing and that it led the jury to believe that the court's failure subsequently to strike the hearsay evidence must necessarily have indicated the court's belief that a conspiracy had been proven beyond a reasonable doubt. But petitioner failed to object to this instruction at trial. There was no error here, let alone "plain error."

The court of appeals correctly held that this instruction—when read as a whole, as it must be (*United States* v. *Park*, 421 U.S. 658, 674)—could not have misled the jury (Pet. App. 3a):

> If the second sentence [of the instruction] stood alone, we would have to agree that it improperly usurped the jury's function in determining whether [petitioner] and Shaffer had conspired. However, the offending sentence was embedded in a long trial in which the instructions to the jury, when read as a whole, on the co-conspirator rule were not only consistent with due process but were actually favorable to the accused. The remainder of the precautionary instruction quoted above, in particular, suggests that the Government must prove *to the jury* that a conspiracy existed between [petitioner] and Shaffer before they may consider Shaffer's hearsay declarations as evidence against [petitioner]. [Emphasis in original.]

Moreover, as the court of appeals observed (Pet. App. 3a-5a), the district court's instructions at the conclusion of the trial (which were not objected to by petitioner) sufficiently apprised the jury that it was required to find that petitioner was a member of the conspiracy before it could consider Shaffer's statements against him. In fact, the instructions were more favorable to petitioner than that to which he was entitled: the court instructed the jury that it must find beyond a reasonable doubt that petitioner and Shaffer conspired before it could consider Shaffer's statements against petitioner (Pet. App. 4a-5a). This required the government to meet its entire burden without regard to any hearsay evidence.[3]

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[3] There is at least a verbal conflict among the circuits concerning the quantum of nonhearsay evidence that must be introduced before the jury is permitted to consider hearsay evidence. Compare *United States* v. *Geaney*, 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028 (hearsay may be considered if the "fair preponderance" of the nonhearsay evidence implicates an individual in a conspiracy); *United States* v. *Wiley*, 519 F.2d 1348, 1350-1351 (C.A. 2) (adhering to *Geaney*); and *United States* v. *Bey*, 437 F.2d 188 (C.A. 3) (following *Geaney*) with *United States* v. *Johnson*, 467 F.2d 804, 807 (C.A. 1), certiorari denied, 410 U.S. 909; *United States* v. *Morton*, 483 F.2d 573, 576 (C.A. 8); and *Rizzo* v. *United States*, 304 F.2d 810, 826 (C.A. 8). The latter cases hold that the nonhearsay evidence of participation in a conspiracy must by itself be sufficient to allow the case to go to a jury before hearsay may be considered against a defendant. Other circuits are internally divided. In light of the instructions to the jury in this case, it is unnecessary for the Court to decide here whether this verbal conflict produces divergent results in sufficient cases to require its resolution.

c. Petitioner contends that the admission of Remedio's testimony concerning conversations with Shaffer deprived him of his ability to confront his accusers. But petitioner had the opportunity to confront Remedio, and it was Remedio—who, petitioner asserts, was free to "exaggerate, embellish and 'gild the lily' with no restraint" (Pet. 23)—who was petitioner's accuser here. Petitioner had ample opportunity to cross-examine Remedio and to challenge his memory and veracity.

Of course, if Shaffer had lived he might have contradicted Remedio's story. But this does not create a Sixth Amendment problem. See *United States* v. *Weber*, 437 F.2d 327 (C.A. 3), certiorari denied, 402 U.S. 932, which analyzed a similar claim. Indeed, in *Delaney* v. *United States*, 263 U.S. 586, 590, this Court held that the Confrontation Clause of the Sixth Amendment does not prevent the introduction of extra-judicial statements made by a dead co-conspirator. To the extent the test of *Dutton* v. *Evans*, 400 U.S. 74, applies to threats and other statements of the sort involved here, they were admissible under that test because Shaffer's statements were against his penal interest. See also Fed. R. Evid. 804(b)(3).

2. Contrary to petitioner's assertion (Pet. 27-32), the government was not required to prove beyond a reasonable doubt the nonexistence of a debt from Remedio to petitioner.[4] 11 Delaware Code 846 de-

[4] This issue was not raised below and there is no reason why it should be considered by this Court. See *Adickes* v.

fines extortion as "compel[ling] or induc[ing] another person to deliver property" through, among other things, the use of threats of physical injury or damage to property. It is not an essential element of the offense that there is no claim of right to the property by the person committing the extortion.[5] Rather, Delaware provides for an affirmative defense based upon a good faith claim of right "to do substantially what he did *in the manner in which it was done*" (11 Delaware Code 847(a) (emphasis added)).

Even if Remedio owed money to petitioner, petitioner has asserted no good faith claim of right to collect it by threatening Remedio with death or injury. Requiring a defendant to make such an affirmative defense does not unconstitutionally shift the burden of proof. Cf. *United States* v. *Hodges*, 493 F.2d 11, 12 (C.A. 5); *United States* v. *Chodor*, 479 F.2d 661, 663-664 (C.A. 1), certiorari denied, 414 U.S. 912; *United States* v. *Rodrigues*, 433 F.2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943.[6]

S. H. Kress & Co., 398 U.S. 144, 147, n. 2; *United States* v. *Ortiz*, No. 73-2050, decided June 30, 1975, slip op. 7.

[5] The "intent" referred to in 11 Delaware Code 841 is the intent to deprive the victim of the property, not, as petitioner suggests (Pet. 27-28), the belief of the actor in the victim's right to the property.

[6] *Mullaney* v. *Wilbur*, 421 U.S. 684, does not affect this analysis. Here the government proved beyond a reasonable doubt the elements of the offense. The ultimate burden remains on the prosecution. And lack of a good faith claim of right (unlike state of mind in a homicide case) has not been

3. Petitioner finally asserts that the court's instruction regarding 11 Delaware Code 846 was "plain error." [7] The district court indicated that the property extorted from Remedio would have had to have been "his property," whereas the statute refers only to "property." Petitioner argues that this instruction precluded the affirmative defense set forth in 11 Delaware Code 847.

Petitioner's claim of prejudice in this regard is not supported by the record. Petitioner argued at trial that the alleged debt owed him excused him from criminal liability. Petitioner testified at length regarding his business dealings with Remedio and his belief that Remedio owed him large sums of money for work done (Tr. 325-485). Defense counsel's summation to the jury argued the affirmative defense (Tr. 723-727). Defense counsel requested an instruction on the affirmative defense, which the court gave (Tr. 752).

Moreover, there is no support for petitioner's claim (Pet. 37) that, had he known that the government was required to prove Remedio's interest in the property extorted, he would have presented evidence that the property belonged to a third person. Under 11 Delaware Code 846 the fact that the property extorted may have belonged to a third person (that

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"almost from the inception of the common law of [the crime], the single most important factor in determining the degree of culpability attaching" (421 U.S. at 696) to extortion.

[7] Petitioner did not object to this instruction at trial. See Fed. R. Crim. P. 30.

is, to neither the victim nor the extortionist) is irrelevant. Indeed, given the effect of this instruction as interpreted by petitioner, the government was presented with a greater burden of proof than is required under Delaware law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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